Supreme Court, U.S.
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No. ① '99 174

In The

Supreme Court of the United States

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AMERICAN COMMERCE NATIONAL BANK, GERALD J. GARNER, JOAN G. GARNER, ROBYN ZIMMET, individually as trustee and on behalf of herself and all others similarly situated, WILLIAM and JANET M. KAVANAGH, ROBERT YOUNG, HARVEY GARNER, individually as trustee and on behalf of himself and all others similarly situated, GALAL S. GOUGH, DUFFERN and ROBERTA HELSING, THOMAS J. HEINZ, ROBERT and SHEILA JOSEPH, HAIM and ELAINE ASA,

Petitioners,

vs.

OFFICE OF THE COMPTROLLER OF THE CURRENCY, RICHARD BLAKE, GERALD FUJITA, RUFUS O. BURNS, and FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondents.

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On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES PRESENTED

Issues relating to the Administrative Procedure Act and declaratory judgment claims:

A. Whether profitable national banks can be deprived of due process by the Office of the Comptroller of the Currency and the judiciary where:

1. The banks are closed by retroactive application of new powers under the Federal Deposit Insurance Corporation Improvement Act of 1991;

2. The courts ignore the absence of a due process hearing and apply the substantial evidence test under 5 U.S.C. § 706(2)(E) of the Administrative Procedure Act in direct conflict with the Supreme Court's decision in *Camp v. Pitts* authorizing such limited review *only* if a hearing was held to create the administrative record; and

3. The district and appellate courts short-circuit Federal Rule of Civil Procedure 56 and controlling case law by failing to review for a genuine issue of material fact of arbitrariness or capriciousness.

Issues relating to *Bivens* claims:

B. Whether there was a genuine issue of material fact regarding a causal connection between the Respondents' anti-Semitism, bureaucratic hostility, and decisional irregularities and the decision to close the profitable Bank which relied on the bigots' statements and reports to the Comptroller.

LIST OF PARTIES

Petitioners:

AMERICAN COMMERCE NATIONAL BANK

GERALD J. GARNER

JOAN G. GARNER

ROBYN ZIMMET (individually as trustee and on behalf of herself and all others similarly situated)

WILLIAM and JANET M. KAVANAGH

ROBERT YOUNG

HARVEY GARNER (individually as trustee and on behalf of himself and all others similarly situated)

GALAL S. GOUGH

DUFFERN and ROBERTA HELSING

THOMAS J. HEINZ

ROBERT and SHEILA JOSEPH

HAIM and ELAINE ASA

Respondents:

OFFICE OF THE COMPTROLLER OF THE CURRENCY

RICHARD BLAKE

GERALD FUJITA

RUFUS O. BURNS

Other Party:

FEDERAL DEPOSIT INSURANCE CORPORATION

STATEMENT UNDER RULE 29.6

American Commerce National Bank was a privately owned California corporation, had no parent company and no subsidiaries that were not wholly owned and was unaffiliated with any company which had issued shares to the public.

TABLE OF CONTENTS

Page(s)

STATEMENT OF ISSUES PRESENTED i

LIST OF PARTIES ii

STATEMENT UNDER RULE 29.6 iii

OPINIONS AND ORDERS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED............. 1

STATEMENT OF FACTS AND COURSE OF PROCEEDINGS.................................. 2

- A. Statement of the Underlying Facts........... 2
- B. Nature of the Case, Course of Proceedings and Disposition Below 5

SUMMARY OF ARGUMENT......................... 6

LEGAL ARGUMENT 8

- A. Standard of Review: This Court Reviews the District Court's Summary Judgment *De Novo* to Determine Whether Appellants Raise a Genuine Issue of Material Fact 9
- B. Proper Application of the FDICIA Amendments Necessarily Raises Genuine Issues of Material Fact 10
  - 1. The District Court Improperly Found FDICIA Violations by Pre-Effective Date Conduct 11

TABLE OF CONTENTS – Continued

Page(s)

2. Both the Pretextual and Substantive Nature of the Comptroller's Finding of a Subsection (E) Violation Raises Genuine Issues of Material Fact 13
    a. The Claimed Concealment Violation Was Mere Pretext Because the Decision to Seize the Bank Was Made Before Any Post-Effective Date Concealment Was Possible 13
    b. Substantive Analysis Raises Issues of Material Fact Relating to Whether the Comptroller Acted Arbitrarily 15
3. Genuine Factual Issues Exist Regarding the Arbitrariness and Capriciousness of the Comptroller's Decision to Seize the Bank Based Upon Alleged Subsection (H) Violations.............................. 15
    a. Evidence that the Loan to Joan Garner Was Not Substandard Raises Genuine Issues of Material Fact 16
    b. Evidence that the Bank Followed the Comptroller's Recommendations And Was in Compliance with the 1989 Formal Agreement Raises Genuine Issues of Material Fact..................... 17
    c. Evidence that a Resolution Was Reached on the Alleged Domination by a Single Individual Raises Genuine Issues of Material Fact 18

TABLE OF CONTENTS – Continued

Page(s)

d. Evidence Contradicting the Allegation of Lack of Competent Management to Supervise the Bank's Loan Portfolio Raises Genuine Issues of Material Fact 19

C. The District Court Improperly Based its Decision on the Substantial Evidence Test When There Was No Due Process Exercised in Creating the Administrative Record 20

D. The Ninth Circuit Departed Drastically From the Accepted and Usual Course of Judicial Proceedings When Reviewing the District Court's Grant of the OCC's and Individual Defendants' Motion for Summary Judgment 22

1. The Substantive Issues Underlying the Comptroller's Document Requests and Allegations of Noncompliance Demonstrate Genuine Issues of Whether the Comptroller Acted Arbitrarily or Capriciously 23

2. Evidence of Antisemitism and Animus Raise Genuine Issues of Material Fact.... 26

a. OCC Examiner States that the Bank's Board "Has Too Many Jews," Comptroller Analyzes Religious Ethnicity of Board Members' Spouses, and Alters Documents, Thus Evidencing Capriciousness 26

b. The OCC Western Regional Director's Comments About "The Jew with the Jewish Jewelry" Raise Genuine Issues of Material Fact..................... 27

TABLE OF CONTENTS – Continued

Page(s)

c. The OCC Attorney's References to "Goldberg" and "Ham Sandwiches" Raise Genuine Issues of Material Fact 27

d. The OCC Director for Bank Supervision's Interview with Bank President William Kavanagh Raises Genuine Issues of Material Fact 28

e. The Comptroller's Arbitrariness Is Also Evidenced by Capricious Manipulation of C.A.M.E.L. Ratings. 29

E. The *Bivens* Claims 30

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

CASES

Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143 (1987) 12

Amoco Oil v. EPA, 501 F.2d 722 (D.C. Cir. 1974) 14

Animal Defense Council v. Hodel, 840 F.2d 1432 (9th Cir. 1988), *as amended*, 867 F.2d 1244 (9th Cir. 1989) 13, 14

Asarco, Inc. v. U.S. Environmental Protection Agency, 616 F.2d 1153 (9th Cir. 1980)...................... 14

Association of Pac. Fisheries v. EPA, 615 F.2d 794 (9th Cir. 1980)..................................... 14

Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) 1

Camp v. Pitts, 411 U.S. 138, 93 S. Ct. 1241 (1973) 6, 7, 22

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 91 S. Ct. 814 (1971) 14, 21

Califano v. Sanders, 430 U.S. 99, 97 S. Ct. 980 (1977) 14, 21

Compton v. Ide, 732 F.2d 1429 (9th Cir. 1984)......... 12

Conner v. Reinhard, 847 F.2d 384 (9th Cir. 1988)...... 30

Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 112 S. Ct. 2072 (1992)................ 9

Esch v. Yeutter, 876 F.2d 976 (D.C. Cir. 1989) 14

Florida Power & Light Co. v. Lorion, 470 U.S. 729, 105 S. Ct. 1598 (1985) 13

Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 976 (9th Cir. 1985).....................7, 9, 22

Page(s)

Gersman v. Group Health Ass'n, Inc., 975 F.2d 886 (D.C. Cir. 1992), *cert. denied*, 511 U.S. 1068, 114 S. Ct. 1642 (1994) 12

James Madison Ltd. v. Ludwig, 82 F.3d 1085 (9th Cir. 1996) 20

Martin v. Bankers Trust Co., 565 F.2d 1276 (4th Cir. 1977) 12

McAndres v. Fleet Bank of Mass., N.A., 989 F.2d 13 (1st Cir. 1993) 12

Oberstar v. FDIC, 987 F.2d 494 (8th Cir. 1993) 8

Schatte v. International Alliance, T.S.E., 182 F.2d 158 (9th Cir. 1950) 12

State Chartered Banks in Wash. v. Peoples Nat'l Bank of Wash., 291 F. Supp. 180 (N.D. Wash. 1966) 21

United States v. Morton Salt Co., 338 U.S. 632 (1950) 8

DOCKETED CASES

FDIC v. Hurwitz, No. CA-H-95-3956 (S.D. Tex. 1995) 8

FDIC v. Schuchmann, No. 93-1024 (D.N.M. 1993) 4, 8

In the Matter of Glen Garrett, No. FDIC-9414k & FDIC-99-032B 8

FEDERAL STATUTES

5 U.S.C.

Section 706(1) 1

Section 706(2) 1, 7, 9, 13, 20, 22

TABLE OF AUTHORITIES – Continued

Page(s)

12 U.S.C.

Section 191 (West Supp. 1999)................1, 10, 12

Section 1819(a) 1

Section 1819(b) 1

Section 1821(c)(5)(E) (West Supp. 1999)......1, 10, 11

Section 1821(c)(5)(H) (West Supp. 1999) 1, 10, 11, 15

Section 1821(d)(6).................................1

28 U.S.C.

Section 1254(1) 1

Section 1331 1

Section 1343 1

Section 2201 1

Federal Deposit Insurance Corporation Improvement Act of 1991

Section 133(a) Pub. L. No. 102-242, 105 Stat. 2236 10

Section 133(b) Pub. L. No. 102-242, 105 Stat. 2236 10

Section 133(g), Pub. L. No. 102-242, 105 Stat. 2236 (1991).................................10, 12

Federal Rule of Civil Procedure 56...................1

TABLE OF AUTHORITIES – Continued

Page(s)

MISCELLANEOUS

Terry Carter, *Banking on Fear: Have Federal Regulators Gone Too Far?*, ABA J., July 1999, at 40 ......8, 9

Terry Carter, *The Zealots and the Senator*, ABA J., Oct. 1998, at 60 8

Stephen Stark & Sarah Wald, *Setting No Records: The Failed Attempt to Limit the Record in Review of Administrative Action*, 36 ADMIN. L. REV. 333, 349-50 (1984) 14

OPINIONS AND ORDERS BELOW

The unreported April 30, 1993 Decision of the Comptroller of the Currency to Appoint a Receiver for American Commerce National Bank is reproduced in the appendix (hereinafter "App."), at page 38. The unreported orders of the district court, dated May 10, 1996, July 18, 1996, July 11, 1997, are reproduced in the appendix at pages 8, 27 and 36, respectively. The February 22, 1999 memorandum on the merits from the United States Court of Appeals for the Ninth Circuit is reproduced at App. 1. The April 28, 1999 order of the Court of Appeals denying the petition for rehearing and rehearing en banc is unreported and is reproduced at App. 170.

JURISDICTION

Following the Ninth Circuit's Order on February 22, 1999, Petitioners filed a Petition for Rehearing and Rehearing En Banc on March 29, 1999. The Ninth Circuit denied the Petition on April 28, 1999. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1). The federal jurisdiction in the court of first instance existed pursuant to 28 U.S.C. §§ 1331, 1343, 2201, and 12 U.S.C. §§ 1821(d)(6) and 1819(a) and (b) and pursuant to the United States Constitution under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

STATUTORY PROVISIONS INVOLVED

Administrative Procedures Act, 5 U.S.C. § 706(2), Federal Deposit Insurance Corporation Improvement Act of 1991, ("FDICIA") (codified as amended at 12 U.S.C. §§ 191 and 1821(c)(5)(E) & (H), and Federal Rule of Civil Procedure 56(c) are reproduced at App. 172.

STATEMENT OF FACTS AND COURSE OF PROCEEDINGS

A. STATEMENT OF THE UNDERLYING FACTS

American Commerce National Bank ("ACNB"), in Anaheim, California, was chartered on February 29, 1984. (E.R. 595.)[1] The Bank was profitable every quarter since 1984, including a pre-tax profit of over $1,700,000.00 in 1992. (E.R. 879.) This success was achieved by successfully weathering a downturn in the Southern California economy. In fact, Findley Reporting Services honored ACNB with the "*SUPER PREMIER PERFORMING BANK* award based on [its] 1991 performance." (E.R. 920, 1391.) ACNB was the only Orange County bank to receive this award. The Bank used this prosperity to better its locale, largely through activity in the Orange County Jewish community, particularly with charitable endeavors and fund-raising activities. (E.R. 876, 1150.)

Since the Bank's inception, the Comptroller closely monitored it through almost yearly examinations. (E.R. 1.) Each of its examinations, with one notable exception, culminated in a Report of Examination, ("ROE"), which encapsulated its findings. (E.R. 1.) During these examinations, the conflict with bank chairman, Gerald Garner, began.

Mr. Garner's Judaism, along with his imposing physical presence and strong personality, perturbed the Comptroller. Unfortunately, the Comptroller escalated the conflict to unlawful proportions. As detailed below, OCC agents called Mr. Garner "the Jew with the Jewish jewelry," "the Big Jew," opined that the Bank's Board "had too many Jews," and inquired at a deposition whether ham sandwiches were served at Board meetings.

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[1] References in this Petition to the excerpts of the record, or "E.R.," filed in the Court of Appeals are included to indicate documentary support for the proposition stated although those documents are not presently included in the Appendix. Such documents will be submitted with a brief on the merits.

The hostility was not limited to mere words. The OCC altered bank files and documents, arbitrarily classified loans, requested documents which were either nonexistent or solely in its possession, falsely accused the Bank of wrongdoing that could not be substantiated, and embarked on intimidating searches which uncovered nothing. (E.R. 735-58, 873-1009.) In one instance, involving an Israeli bond purchased by the Bank, the intercession of Israel's Minister of Finance with the United States Treasury Department was necessary to resolve the situation. (E.R. 875-76.) The OCC employees resented Mr. Garner after this because they felt he could "go over their heads" in the case of a disagreement.

In July 1992, the Comptroller conducted a surprise examination supervised by Respondent Richard Blake. (E.R. 929, 1434.) The examiners appeared during customer hours in a raid-like fashion, accompanied by an FBI agent and two Secret Service agents whose firearms were in plain sight, immediately sealing rooms with crime-scene tape. (E.R. 929, 1161, 1434.) An intense examination followed, focusing almost exclusively on loan files from 1984 to 1988. (E.R. 930.) Nearly 200,000 pages were copied at the Bank's expense, while numerous loan files were simply removed from the Bank. (E.R. 930, 2031.) The Comptroller was obviously not interested in the July 1992 condition of the Bank. No ROE was ever prepared for this examination. (E.R. 435.)[2]

The Bank's last examination began in November of 1992, and analyzed the Bank's condition "as of" September 30, 1992, although the Bank did not receive this ROE until February 25, 1993 ("September 1992 ROE"). (E.R. 426.) The September 1992 ROE demanded thousands of documents dating back nearly a decade – to be produced a mere 25 days later. (E.R. 383-86.) The Comptroller already possessed many of these documents or knew that they did not exist pursuant to the Bank's OCC-approved document retention policy. As raised in the Bank's Final Response, ("Final Response"), the September 1992 ROE contained misstated facts, unsubstantiated accusations and arbitrary conclusions.

Suddenly and without warning, the Comptroller closed the Bank a mere three days after the Final Response was received. Although insolvency had always been a prerequisite to closure, the Comptroller interpreted new statutory language to authorize the seizure of solvent banks. The Bank never received notice or a hearing before the closure. The justification for the closure is detailed in the OCC's Decision Document. (App. 38.) The legal errors in the Decision Document are discussed more fully below.

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[2] These events generated civil charges by the OCC. An eight-and-one-half-month administrative hearing was held to determine whether civil penalties should be assessed, although it was never completed. (E.R. 873.) After demanding $1 million against Mr. Garner's wife of 36 years, Joan, the Comptroller settled for only $22,000. (E.R. 910.) After seeking half-a-million dollars against Daniel Garner, the OCC accepted a mere $15,000. (E.R. 910.) Other directors settled for approximately $1,000.00 each. OCC counsel later stated that the Comptroller retained Mrs. Garner and Daniel Garner only to secure a stipulation from Gerald Garner, (E.R. 910), reminiscent of banking regulators' tactics in *FDIC v. Schuchmann*, No. 93-1024 (D.N.M. 1993) (refusing claims against wife to go to jury, noting "It's obvious to the court that the reason she was sued is to try to get at her husband"). As the process physically and emotionally wore him down, Mr. Garner finally stipulated to a fine and an agreement not to re-enter the banking profession.

B. Nature of the Case, Course of Proceedings and Disposition Below

Petitioners filed this action against the Comptroller, various individual defendants, and the Federal Deposit Insurance Corporation ("FDIC"). The Second Amended Complaint sought judicial review of the Comptroller's improper decision and redress for Respondents' wrongs. On July 11, 1997, the district court finally disposed of all claims against Respondents based upon the following:

Summary Adjudication of *Bivens* Claims: On May 10, 1996, the district court granted summary judgment because it found "the defendants' anti-Semitic conduct was [not] a 'substantial' or 'motivating' factor in the Bank's closure." (App. 14.) The district court found no causal connection between the Comptroller's misconduct and the closure despite the Comptroller's reliance, at the time of the closure, on documents created *by* OCC agents engaging in improper conduct and created *at the time* of the improper conduct.

Summary Adjudication of APA Claims: Because the statutory authority did not take effect until December 20, 1992, and in an effort to avoid the issue of retroactivity, the July 18, 1996 Order attempted, unsuccessfully, to base its decision on post-effective-date conduct. (App. 31.) The district court erroneously examined the Comptroller's

Administrative Record, compiled solely by the OCC in the absence of a hearing, under the substantial-evidence test. (App. 29.) Furthermore, the court expressly rejected its obligation to review for genuine issues of material fact and improperly decided the ultimate jury question. (App. 29.)

SUMMARY OF ARGUMENT

This is yet another recent case of federal banking regulators acting tyrannically. This very first closure of a profitable bank raises important national issues because it involves: (1) the retroactive application of a new power to pre-effective-date conduct when closing a solvent bank; (2) judicial employment of the APA's substantial evidence test – in direct contravention of *Camp v. Pitts* permitting such review *only* if a hearing was held to create the administrative record – in a case where no hearing occurred; (3) a short-circuiting of FRCP 56 and controlling case law by failing to review for a genuine issue of material fact of arbitrariness; and (4) numerous facts raising genuine issues of a causal connection between the individual defendants' anti-Semitism and the Comptroller's reliance on the statements and reports of those individuals to close the Bank.

The lower courts upheld the exercise of new statutory power on the Bank's conduct which occurred prior to the statute's effective date. The courts' decisions repeatedly reference the September 1992 ROE for support of post-effective-date conduct. Although written after December 20, 1992, the ROE concerned itself with the Bank's condition as of September 30, 1992 – by its own terms, this last ROE only reflected pre-effective-date conduct. Not only was pre-effective-date conduct the basis for closure, a substantive analysis of the conduct itself raises issues of arbitrariness, regardless of when it occurred.

The lower courts failed to properly review the OCC decision by employing the substantial-evidence test despite the fact that there was no hearing held to create the Comptroller's administrative record. This Court's decision in *Camp v. Pitts* expressly prohibits application of 5 U.S.C. § 706(2)(E) in such circumstances.

The inferior courts also employed an incorrect standard of review. At the summary judgment stage, the role of judicial review is "to determine whether appellant[s] raised a genuine issue of material fact as to *whether* the [Comptroller] acted arbitrarily" or capriciously. *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 982 (9th Cir. 1985) (emphasis added). The courts erroneously examined the record solely for arbitrariness, rather than for genuine issues as to *whether* the Government acted arbitrarily.

Genuine issues exist regarding the causal connection between the personnel's anti-Semitism and religious animus and the Comptroller's reliance on reports created by those individuals in closing the Bank. Use of derogatory terms combined with the Comptroller's warped analysis of the Board members' religious backgrounds and tampering with loan files lead to the inescapable conclusion that there is a question of fact regarding whether the decision to close this profitable Bank was the result of legally impure motives. Because such obvious errors and questions of fact exist, the writ of certiorari should issue.

LEGAL ARGUMENT

> The APA was framed against a background of rapid expansion of the administrative process as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices. It created safeguards even narrower than the constitutional ones, against arbitrary official encroachment on private rights.

United States v. Morton Salt Co., 338 U.S. 632, 644 (1950) (Jackson, J.). This overzealousness has been recognized recently in several cases and articles in national publications,[3] emphasizing the national importance of the issues raised in this case.

These recent cases illustrate the regulators' excesses, compared by many to "witch-hunts" and "runaway trains." These excesses are ghoulishly manifest in examiners' perjured testimony, using "dirty tricks and fraud to build or continue cases that never should have been brought or should have been dropped," and "[b]reathing fire with FIRREA . . . quickly earn[ing] reputations for suing first . . . then building cases later." Terry Carter, *supra* note 3 at 41-43, 49. Such excesses occurred in the instant case. Review is necessary to stem this tide of governmental abuses, establish clear lines for application of new powers, and ensure appellate consistency in the review of administrative decisions.

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[3] These include *Oberstar v. FDIC*, 987 F.2d 494 (8th Cir. 1993) (finding improper the government's penalty assessment, noting "We are concerned this is not an isolated occurrence" and citing a Fifth Circuit case criticizing FDIC activity which "looks to us uncomfortably like judicial vindictiveness"); *In the Matter of Glen Garrett*, No. FDIC-9414k & FDIC-99-032B (bringing to light abuses that apparently were not so unusual but instead raised disturbing questions about overzealous banking regulators who developed an abusive culture much like that of the Internal Revenue Service); *FDIC v. Hurwitz*, No. CA-H-95-3956 (S.D. Tex. 1995) (finding demonstrations of "the agency's bad faith"); *FDIC v. Schuchmann*, No. 93-1024 (D.N.M. 1993) (refusing claims against wife to go to jury, noting "It's obvious to the court that the reason she was sued is to try to get at her husband"); Terry Carter, *Banking on Fear: Have Federal Regulators Gone Too Far?*, ABA J., July 1999, at 40; Terry Carter, *The Zealots and the Senator*, ABA J., Oct. 1998, at 60.

A. Standard of Review: This Court Reviews the District Court's Summary Judgment *De Novo* to Determine Whether Petitioners Raise a Genuine Issue of Material Fact.

This Court reviews *de novo* the district court's granting of summary judgment. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 465 n.10, 112 S. Ct. 2072, 2081 n.10 (1992). Pursuant to the APA, 5 U.S.C. § 706(1), (2)(A)-(B), a reviewing court must examine the Comptroller's "action, findings, and conclusions" to see if they are: arbitrary, capricious, an abuse of discretion, in disaccord with law, or contrary to constitutional right, power, or privilege. At the summary judgment stage, the role of judicial review is "to determine whether appellant[s] raised a genuine issue of material fact as to whether the [Comptroller] acted arbitrarily," capriciously, not in accordance with law, abused its discretion or contrary to constitutional right. *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 982 (9th Cir. 1985).

B. Proper Application of the FDICIA Amendments Necessarily Raises Genuine Issues of Material Fact.

Recent amendments to the National Bank Act ("NBA"), and Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), have empowered banking regulators to "breathe fire" by appointing a receiver for a solvent bank without prior notice or hearing. Federal Deposit Insurance Corporation Improvement Act of 1991, ("FDICIA"), sec. 133(a), (b), Pub. L. No. 102-242, 105 Stat. 2236, 2270-71 (codified as amended at 12 U.S.C. §§ 191, 1821 (West Supp. 1999)). Specifically, the NBA now states: "[t]he Comptroller of the Currency may, without prior notice or hearings, appoint a receiver for any national bank . . . if the Comptroller determines, in the Comptroller's discretion, that – (1) one or more of the grounds specified in section 1821(c)(5) of this title exist. . . . " 12 U.S.C. § 191 (West Supp. 1999).

The particular grounds which authorize the Comptroller to act were amended to include concealment of documents and any unsafe or unsound practice likely to seriously prejudice the interests of depositors. 12 U.S.C. § 1821(c)(5)(E) & (H) (West Supp. 1999). The amendments became effective December 20, 1992. FDICIA, sec. 133(g), Pub. L. No. 102-242, 105 Stat. 2236, 2273 (1991).

All of the conduct alleged in the OCC's Decision Document but the renewal of one loan, occurred prior to the effective date of the amendments. The district court recognized this as a problem and sought to avoid the issue of retroactivity by finding in the Administrative Record Bank conduct transpiring after the amendments' effective date. (App. 31.) The district court incorrectly ruled that post-effective-date conduct violated § 1821(c)(5)(E) and (H) and, therefore, that conduct alone sufficiently supported the OCC's decision to close the Bank. (App. 31.) However, the district court erred by retroactively applying the statute to pre-effective-date conduct and by failing to identify factual issues surrounding whether the Comptroller's substantive finding of Subsection (E) and (H) violations was arbitrary and capricious.

1. The District Court Improperly Found FDICIA Violations by Pre-Effective-Date Conduct.

The district court merely based its decision, with one exception, on the *effects* of pre-effective-date conduct rather than on post-effective-date *acts*. The lower court repeatedly referenced the September 1992 ROE for support of post-effective-date conduct. (App. 32-35.) Although written after December 20, 1992, the ROE addressed the Bank's condition as of September 30, 1992. (E.R. 357, 359.) In fact, even the exit interview with the Bank occurred on December 17, 1992 – three days *before* the FDICIA amendments became effective. By its own terms, evidence contained in the September 1992 ROE only reflected pre-effective-date conduct.

The district court focused on the *effect* of this conduct, rather than on the *conduct* itself. The OCC closed the Bank, and the lower courts affirmed the closure, for failure to correct the allegedly unsafe and unsound *condition* of the Bank; a condition which, if true, arose from pre-effective-date conduct. In so holding, the district court impermissibly violated the canon prohibiting retroactive application of the statute. *McAndres v. Fleet Bank of Mass., N.A.*, 989 F.2d 13 (1st Cir. 1993) (finding that for FIRREA amendments to apply prospectively, *conduct* must occur after the effective date); *Gersman v. Group Health Ass'n, Inc.*, 975 F.2d 886, 899 (D.C. Cir. 1992), *cert. denied*, 511 U.S. 1068, 114 S. Ct. 1642 (1994) (focusing on post-enactment *conduct* for prospective application).

Liability for the residual conditions of pre-enactment conduct has been rejected by many courts. For example, the Fourth Circuit rejected a continuing effects argument in the ERISA context in *Martin v. Bankers Trust Co.*, 565 F.2d 1276, 1278-79 (4th Cir. 1977), holding that a continuing-effects theory was "without merit since it, in effect, would read the exception of section (b)(1) out of the statute." *Id.*

Likewise, bringing pre-effective-date conduct within the ambit of the FDICIA amendments would, in effect, read the effective date out of subsection 133(g). *See also Compton v. Ide*, 732 F.2d 1429, 1432-33 (9th Cir. 1984) (holding that "[t]o establish a continuing violation [under 42 U.S.C. § 1983], continued unlawful acts must be demonstrated."), *abrogated on different grounds by Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143 (1987); *Schatte v. International Alliance, T.S.E.*, 182 F.2d 158, 164 (9th Cir.), *cert. denied*, 340 U.S. 827, 71 S. Ct. 64 (1950) (rejecting a continuing breach theory in the context of § 301 of the Taft-Hartley Act). The district court decision based on Subsections (E) and (H) must be reversed for impermissibly applying the FDICIA amendments to pre-effective-date conduct which would be governed by the former § 191 and the closure precluded due to the Bank's solvent state at the time of closure.

2. Both the Pretextual and Substantive Nature of the Comptroller's Finding of a Subsection (E) Violation Raises Genuine Issues of Material Fact.

The district court found that Subsection (E) was violated by the Bank's alleged failure to provide a laundry list of documentation requested by the September 1992 Examination. (App. 31-33.) There are two fundamental errors with this decision.

a. The Claimed Concealment Violation Was Mere Pretext Because the Decision to Seize the Bank Was Made Before Any Post-Effective-Date Concealment Was Possible.

Although the Comptroller created the illusion of closure due to a Subsection (E) violation, the OCC's own documents prove it is illusory and pretextual. Actually, the decision to close the Bank was made *well before* the requested documents were due.

Nearly two weeks *before* the Bank even *received* the September 1992 ROE, an FDIC e-mail indicates that the OCC had already decided to "just pull the plug" on the Bank. (E.R. 2069.)[4] Another memorandum, dated before the response was due, stated that "the OCC intends to close this bank on Friday, April 2, 1993," and refers to the closure as an "unusual transaction." (E.R. 2360.) A March 1, 1993 e-mail, written *three weeks before* the Bank's response was due, states that earlier, "detailed discussions with the OCC regarding the closure of this bank" indicated that "the OCC will not change their minds" about a scheduled April 2, 1993 closure. (E.R. 2068.) Although the closure date was later moved to April 30, 1993, the decision to seize this solvent bank was made

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[4] Examination of these documents is proper. Although the administrative record is the "focal point" of review, *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44, 105 S. Ct. 1598, 1607 (1985), "certain circumstances may justify expanding review beyond the record" to properly ascertain whether the Comptroller's decision satisfies the strictures of § 706(2)(A)-(B), *Animal Defense Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988), *as amended*, 867 F.2d 1244 (9th Cir. 1989), particularly those "requir[ing] the reviewing court to engage in a substantial

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inquiry" through "a thorough, probing, in-depth review." *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 415, 91 S. Ct. 814, 823 (1971), *overruled on other grounds, Califano v. Sanders,* 430 U.S. 99, 97 S. Ct. 980 (1977). "The court cannot adequately discharge its duty to engage in a 'substantial inquiry' if it is required to take the agency's word that it considered all relevant matters." *Asarco, Inc. v. U.S. Environmental Protection Agency,* 616 F.2d 1153, 1160 (9th Cir. 1980). In fact, "[t]he district court may also inquire outside of the administrative record 'when it appears the agency has relied on documents or materials not included in the record.' " *Hodel,* 867 F.2d at 1244 (citation omitted). Several courts have examined evidence arising after the agency action which shows whether the decision was correct or not. *See, e.g., Association of Pac. Fisheries v. EPA,* 615 F.2d 794, 811-12 (9th Cir. 1980); *Amoco Oil v. EPA,* 501 F.2d 722, 731 (D.C. Cir. 1974); Stephen Stark & Sarah Wald, *Setting No Records: The Failed Attempt to Limit the Record in Review of Administrative Action,* 36 ADMIN. L. REV. 333, 349-50 (1984) (cited with approval by *Esch v. Yeutter,* 876 F.2d 976, 991 n.166 (D.C. Cir. 1989)). This is particularly true where the Administrative Record has been created solely by the agency.

The instant case requires an examination of a handful of documents outside the Administrative Record which raises questions of material fact about whether the decision to close the Bank was based on alleged post-effective-date violations, or was made long before the Bank's response was due.

long before the Bank's response was due. As a result, the contention that post-effective-date Subsection (E) violations formed the basis for the closure rings hollow. The very reliance on such a false and hollow claim testifies of the arbitrariness and capriciousness of the Comptroller's decision and raises questions of material fact.

The impact of the OCC's decision to close the Bank prior to even issuing its ROE, is that the decision was based on pre-effective-date conduct. Therefore, the Bank's solvency renders the OCC's decision improper and should be reversed.

b. Substantive Analysis Raises Issues of Material Fact Relating to Whether the Comptroller Acted Arbitrarily.

Due to the overlap between the underlying validity of the alleged Subsection (E) violations and the raising of genuine issues of material fact, the analysis of these facts and law will be combined in section D-1, *infra*.

3. Genuine Factual Issues Exist Regarding the Arbitrariness and Capriciousness of the Comptroller's Decision to Seize the Bank Based Upon Alleged Subsection (H) Violations.

The district court also found that "the OCC's closure of the Bank was properly based on the existence, after December 20, 1992," of violations of Subsection (H) of § 1821(c)(5). (App. 33.) The district court found that the following conduct violated Subsection (H): (1) the renewal of a "substandard" loan to Bank director Joan Garner; (2) the Bank's alleged failure to comply with a 1989 Formal Agreement; (3) continued domination and control of the Bank by a single individual; and (4) the Bank's lack of competent management to supervise its loan portfolio. (App. 34.) As addressed below, each of these four manufactured "violations" are the product of the OCC's arbitrariness and capriciousness.

a. Evidence that the Loan to Joan Garner Was Not Substandard Raises Genuine Issues of Material Fact.

Even if this Court reaches the merits of the four alleged violations of Subsection H, summary judgment was improperly granted. The lower court found that the renewal of a loan to Joan Garner on January 15, 1993, was an unsafe or unsound practice because the loan was classified as substandard.[5] (App. 34.) The court looked only at the loan's renewal date and failed to explore the genuine issues concerning the loan's classification as a threshold matter.

During Mrs. Garner's ten years as a Bank customer, she took out numerous loans, none of which was classified at any time. (E.R. 87, 139, 223, 265, 321.) There was never a question regarding Mrs. Garner's collateral values or the sufficiency of appraisals. (E.R. 904.) With this history in mind, the January 1993 renewal of the Joan Garner loan occurred because (1) the loan was current since its inception, (2) there was adequate collateral to secure the loan in the form of Mrs. Garner's personal residence at a 73% Loan-To-Value ratio, and (3) the loan was not classified during the OCC's on-site examination. (E.R. 499-500.)

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[5] "Classified loans are those loans that are in need of strengthening and careful management if they are to be collected. They are assigned a quality rating based on the degree of risk and likel[ihood] of loss if the deficiencies are not corrected. They are categorized into three categories based on the level of risk that exists: Substandard, Doubtful, Loss." (E.R. 616.)

Despite such favorable history and characteristics, the loan was classified as substandard by the OCC just before the final ROE was issued.[6] (E.R. 396.) The district court found a Subsection (H) violation simply because of the renewal, which ironically occurred *before* the loan was classified, without examining the belated classification. In so doing, the court allowed the OCC to bootstrap its decision into legitimacy. The OCC successfully insulated its initial classification from judicial review and ensured that its intra-agency decision was impenetrable. Such bootstrapping and superficiality require the "probing review" contemplated by the APA – particularly where the regulators' overzealousness is commensurate with overwhelming power.

b. Evidence that the Bank Followed the Comptroller's Recommendations And Was in Compliance with the 1989 Formal Agreement Raises Genuine Issues of Material Fact.

The district court found a Subsection (H) violation due to "the Bank's continued failure to comply fully with a Formal Agreement instituted between the Bank and the regulators in 1989." (App. 34.) The Agreement required Bank action "securing and memorializing commitments to effect specific remedial measures to address safety and soundness concerns." (E.R. 610.) To do so, the Bank appointed a Compliance Committee "to coordinate, monitor and apprise" the Bank of compliance. (E.R. 460.) Despite the submission of monthly reports containing (a) Committee meeting minutes, (b) actions taken to comply with the Agreement, and (c) results of those actions, (E.R. 460-61), the OCC, in a cursory statement, found only partial compliance – without stating *how* the Bank failed to honor the Agreement. (E.R. 364.) The capriciousness of this allegation is evidenced by (1) the fact that even the FDIC found that "written progress reports are submitted to the board and the OCC on a monthly basis," (E.R. 2260), (2) the content of the Bank's monthly reporting documents received OCC approval, (E.R. 944), and (c) the OCC failed to criticize these reports until the vague comment in its last ROE. (E.R. 945, 977.)

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[6] The arbitrariness of the OCC's loan classifications is evidenced by the subsequent performance of classified loans. For example, the July 1989 ROE classified approximately $10,782,000.00 in loans. (E.R. 223, 890.) At the time of closure, $9,979,000.00, or 93%, had been repaid on the "classified" loans. (E.R. 891.) Payments received after the April 30, 1993 seizure are not included in this figure; therefore, the actual return may be greater.

c. Evidence that a Resolution Was Reached on the Alleged Domination by a Single Individual Raises Genuine Issues of Material Fact.

Another glaring example of the OCC's arbitrariness involves the accusation of domination and control by a single individual, Gerald Garner. Due to the improper, yet repeated and emphatic, allegations regarding Gerald Garner's domination, Mr. Garner agreed in early 1993 to resign from his insider positions on May 6, 1993. It is the epitome of capriciousness to close a bank based on the individual domination of a person whose resignation has already been acknowledged. Citing a situation which had been remedied as justification for closure before the approved solution could be implemented is strong evidence of regulatory overzealousness.

d. Evidence Contradicting the Allegation of Lack of Competent Management to Supervise the Bank's Loan Portfolio Raises Genuine Issues of Material Fact.

Lastly, the district court found a post-effective-date Subsection (H) violation in the alleged lack of competent management to supervise the loan portfolio. (App. 34.) The Bank responded by resubmitting reviews by independent evaluation companies which came to the opposite conclusion from the Comptroller. For example, a review conducted by a highly regarded 16-year former OCC examiner, concluded that he "was impressed with the increased degree of recorded analysis of credit apparent since I last reviewed a portion of the Bank's commercial loan portfolio in January, 1988. . . . I feel the volume of criticized assets experienced by the Bank is not the result of shortcomings in underwriting standards, but rather the result of depressed economic conditions out of the Bank's control. It is thus noteworthy that the Bank continues to enjoy a sound and conservative collateral position with most of its credit relationships, to include a majority of those whose credits are subject to criticism." (E.R. 449-500.) Additionally, other independent studies resulted in positive conclusions regarding management, (E.R. 450), CRA policy and community involvement activity. (E.R. 450.) In addition to the Bank's profitability since its inception as a testament to management's competency, these reviews provided solid, independent proof of management's capabilities.

C. The District Court Improperly Based its Decision on the Substantial-Evidence Test When There Was No Due Process Exercised in Creating the Administrative Record.

The district court simply employed an incorrect standard of review. The district court improperly focused on § 706(2)(E) which relates to the limited question of substantial support in the administrative record. Ostensibly finding substantial support, the district court decided that a separate determination on the issues of arbitrariness and capriciousness was unnecessary. At an illogical extreme, the court found that in all cases, if supporting evidence of an administrative decision is found in the one-sided, agency-compiled record, then that decision cannot be arbitrary or capricious. Courts have rejected this position, for obvious reasons. As stated in a slightly different context:

> For example, examiners could follow all the prescribed steps for estimating loan loss reserve requirements – reviewing loan files, assigning risk ratings to the loans, using historical experience to determine the future losses on those loans – and still violate the APA by ignoring salient facts in the loan fields, offering patently implausible justifications for their decisions, or acting from a personal desire to shut down the bank regardless of what they found.

James Madison Ltd. v. Ludwig, 82 F.3d 1085, 1098 (9th Cir. 1996).

The district court's decision ignored the absence of due process prior to the Bank's closure. A hearing, where both sides present evidence, is essential to the substantial-evidence test because the administrative record relied upon must contain both sides of the story, not simply a monocular document compiled by zealots. In this case, the Comptroller's reasoning was unchecked, and the Bank's position unprotected, even through judicial "review."

Limiting review in this manner allowed the OCC to manipulate the record so as to completely insulate itself from reversal and effectively preclude accounting to anyone for its actions. By ensuring that the record contained an appearance of "facts" sufficient to support its decision, though taken out-of-context, unverified or improperly obtained, the Comptroller could do as it pleased with impunity. As expressed by another court: "By permitting an administrator to choose what fact[s] will govern his fact-finding determinations he can conceivably choose any set of fact[s] which will give him the result he seeks. I can find no expression of Congress which would support any theory of this kind. . . . " *State Chartered Banks in Wash. v. Peoples Nat'l Bank of Wash.*, 291 F. Supp. 180, 194 (N.D. Wash. 1966).

This Court has twice spoken to this very issue: "Review under the substantial-evidence test is authorized *only* when the agency action is . . . based on a public adjudicatory hearing," *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414, 91 S. Ct. 814, 822-23 (1971), *overruled on other grounds, Califano v. Sanders*, 430 U.S. 99, 97 S. Ct. 980 (1977) (emphasis added); and, "the proper standard for judicial review of the Comptroller's adjudications [when the Comptroller is not required to hold a hearing] is *not* the 'substantial evidence' test which is appropriate when reviewing findings made on a hearing record, 5 U.S.C. § 706(2)(E)." *Camp v. Pitts,* 411 U.S. 138, 141, 93 S. Ct. 1241, 1243 (1973) (emphasis added). The lower courts departed drastically from this standard.

D. The Ninth Circuit Departed Drastically from the Accepted and Usual Course of Judicial Proceedings When Reviewing the District Court's Grant of the OCC's and Individual Defendants' Motion for Summary Judgment.

The district court erroneously stated in its opinion that "[o]n review of an agency decision, the standard for summary judgment is not whether there is a genuine issue of material fact, but rather, whether the agency action" violated the Administrative Procedure Act. (App. 29.) Thus, the lower court ignored controlling precedent requiring a different analysis at the summary judgment stage.

Pursuant to the APA, the reviewing court must examine the Comptroller's "action, findings, and conclusions" to see if they are: arbitrary, capricious, an abuse of discretion, in disaccord with law, or contrary to constitutional right, power, or privilege. However, *at the summary judgment stage,* the role of judicial review is "to determine whether appellant[s] *raised a genuine issue of material fact as to whether the [Comptroller] acted arbitrarily," capriciously, not in accordance with law, abused its discretion or contrary to constitutional right. Friends of Endangered Species, Inc. v. Jantzen,* 760 F.2d 976, 982 (9th Cir. 1985) (emphasis added). It is clear that there are many factual issues surrounding the arbitrariness and capriciousness of the OCC's decision, any one of which precludes summary judgment.

1. The Substantive Issues Underlying the Comptroller's Document Requests and Allegations of Non-Compliance Demonstrate Genuine Issues of Whether the Comptroller Acted Arbitrarily or Capriciously.

When the proper standard of review is employed, even a cursory examination reveals the capricious nature of the Comptroller's decision. The court wholly failed to examine the substance of the document requests, the Bank's prior compliance with or inability to comply with the requests. (App. 4-6.) The lower courts simply accepted the OCC allegations of non-compliance as true without probing review. In fact, the district court merely parroted the OCC's contentions in the Decision Document. (App. 33.) A brief examination of the requests demonstrates how the Decision Document was based upon a faulty conclusion of non-compliance due to requests for information already in the OCC's possession or which the OCC knew did not exist. Three examples must suffice in this Petition.

Personal Financial Statements: The OCC requested the personal financial statements of Daniel and Gerald Garner from 1986 to 1993, claiming that prior requests for the information had not been satisfied. (E.R. 384, 611.) However, a 1988 memorandum from OCC examiner Bernal acknowledged receipt of Daniel's 1988 statement. (E.R. 2648.) Unsurprisingly, this memorandum was not included in the Administrative Record, while the accusation of non-compliance was emphasized. (E.R. 641-44.) Additionally, Daniel's 1989 and 1990 statements were taken by OCC examiner Duchscherer and could not be reproduced because (1) Daniel repaid his loans in full in

1991 and did not borrow nor owe any money thereafter; therefore no reason existed to have the '91-'93 financial statements, (E.R. 2408), and (2) the personal copies of these statements were destroyed in the Chino Hills fire which consumed his house. (E.R. 2408, 2649.) The OCC's requests for Daniel Garner's documents which were already in their possession or no longer kept by the Bank were arbitrary and capricious.

The then-current financial statements of Gerald Garner were at all times in the Bank's files, including his joint financial statement which was also placed in the Joan Garner loan file. (E.R. 454.) Tellingly, the OCC produced Mr. Garner's tax returns from 1983 to 1991 and joint financial statements with his wife at the administrative hearing. (E.R. 990, 1726.) Once again, the OCC made a repetitive request for information which it already possessed and then claimed "concealment." (E.R. 629.) The fact that the OCC can produce these documents at one moment and claim non-compliance the next smacks of capriciousness.

Corporate Loan Files: The September 1992 ROE requested complete loan files for corporate loans to Medi-Fin and Dal Rae Restaurant. (E.R. 384, 611.) The Medi-Fin loan was completely repaid at no loss to the Bank over three years prior to this request. (E.R. 454.) The OCC analyzed every check and every deposit related to this account. Every item from the file was copied and then segregated into categories by examiner Townsend. To conduct this microscopic review, the examiners removed the loan file from the Bank; the file was never returned. The OCC obtained the requested information and when it could not prove any misdeeds, accused the Bank of non-compliance.

The Dal Rae loan was also paid in full, with no loss to the Bank, years before the request was made for the loan file. (E.R. 455.) Examiners subsequently removed the loan file, never returning it. With the entire file in its possession, the OCC then requested the information, knowing that compliance was impossible.

These two loans were at issue in the administrative proceeding. Following thorough review of the files, however, the OCC removed the Medi-Fin and Dal Rae loans from its list of alleged violations. Subsequently, the OCC claimed that these documents were not produced and used this basis to close down the Bank.

Coast Plaza Documents: The OCC demanded all corporate documents relating to Associated Partners of Coast Plaza, Inc. (E.R. 385, 612.) The Bank provided the OCC with every Coast document in its possession, dating back to 1991, but the OCC faulted the production for not including documents to January 1, 1988. (*See* E.R. 00385.) However, Coast Plaza did not exist until January 1, 1991. (E.R. 456.) Once again, arbitrariness manifested in a decision based upon failure to produce non-existent documents.

As these three examples demonstrate, the OCC demanded documents dating back nearly a decade before the ROE was received by the Bank. (E.R. 384-86, 611-13.) Every request is a repeat of prior requests which were made through earlier ROE's. (E.R. 383-86, 451-56.) More importantly, the documents were either produced at the time of the initial request or did not exist at the time of the 1993 request. (E.R. 451-56.) By requesting non-existent documents which obviously could not be produced, the

OCC alleged non-compliance. The circumstances surrounding "non-compliance" in 1993 demonstrate the arbitrariness and capriciousness of the OCC's decision.

2. Evidence of Anti-Semitism and Animus Raise Genuine Issues of Material Fact.

The factual issues regarding the Comptroller's capriciousness raised by the above-cited documentary evidence are further supported by Respondents' anti-Semitism. Such bigotry began shortly after the Comptroller's involvement with the Bank.

a. OCC Examiner States that the Bank's Board "Has Too Many Jews," Comptroller Analyzes Religious Ethnicity of Board Members' Spouses, and Alters Documents, Thus Evidencing Capriciousness.

Examiner Gerald Fujita first raised anti-Semitism by stating that the Bank "had a bad ethnic balance," meaning that "there were too many Jews on the Board." (E.R. 2699.) Fujita claimed this was the opinion of the OCC's San Francisco office. (E.R. 873.) On February 4, 1988, Fujita's comments were discussed in a meeting attended by the Bank's entire Board of Directors, the Bank's attorneys from Morrison & Forester, and several OCC personnel. (E.R. 873.) This meeting resulted in an OCC apology and Fujita's removal. (E.R. 873, 1052.) Fujita's anti-Semitism shaped his entire evaluation and led to the 1987 ROE that was characterized by the OCC's Western Region Deputy Director as "unusual." (E.R. 875.) The 1987 ROE prepared by Fujita was relied upon in the Decision Document. (E.R. 44-46.)

The 1987 ROE was pockmarked by altered and stolen documents. For example, attempting to prove concealment, Fujita whited-out Daniel Garner's name on loan documents. (E.R. 881.) However, Fujita only doctored a copy and when examiner Richard Taft secured the original document it revealed the Bank's proper conduct. (E.R. 881.)

Fujita's anti-Semitic tentacles reached out into the September 1992 ROE. Anna Marie Gallegher, who participated in the September 1992 ROE, analyzed directors' spouses, noting that one was Jewish and another Catholic. (E.R. 877, 1154.) The very fact that such notations and analyses occurred demonstrates the Comptroller's capriciousness.

b. The OCC Western Regional Director's Comments About "The Jew with the Jewish Jewelry" Raise Genuine Issues of Material Fact.

As OCC Western Regional Director, Rufus Burns played a supervisory role in the investigation of the Bank. (App. 16.) Burns supervised analysts' on-site examinations and recommendations for OCC action. Burns also made anti-Semitic comments, such as referring to Gerald Garner as "the Jew with the Jewish jewelry." (E.R. 2699.)

c. The OCC Attorney's References to "Goldberg" and "Ham Sandwiches" Raise Genuine Issues of Material Fact.

Attorney Richard Blake appeared in 1990 and was intimately involved in the OCC's examinations, the July 1992 armed "raid," and the Bank's closure. (E.R. 1434.) Blake's anti-Semitic prejudice manifested itself through references to Mr. Garner as "Goldberg,"[7] (E.R. 877), and through his subordinates asking Daniel Garner if he changed names to "change from being Jewish." (E.R. 2699.) Additionally, a secretary at the Bank testified in a deposition that sandwiches were eaten during board meetings. (E.R. 878.) On the record Mr. Blake commented, "They weren't ham sandwiches, by chance, were they?" (E.R. 1155).

d. The OCC Director for Bank Supervision's Interview with Bank President William Kavanagh Raises Genuine Issues of Material Fact.

William Kavanagh was interviewed for the position of bank president by the OCC's Director for Bank Supervision, Joseph Vaez, during which Vaez told Mr. Kavanagh (1) "that if I ever got 'into bed' with Gerald Garner he would personally see to it that I would never be allowed to work in banking again"; (2) that Vaez "wanted me to work closely with him against Garner because Garner had an unsatisfactory ethnic origin and was of highly questionable character"; and (3) that he "noted me being a 'Southerner' as a likely reason that I would be anti-Semitic and inquired if working so closely with Mr. Garner would be a problem in that regard." (E.R. 1156-57.) Mr. Kavanagh was "stunned" by these comments.

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[7] Mr. Garner had gone by the name of Gerald Goldberg when living in New York. Independent of Blake's motivation for referring to Mr. Garner as Goldberg, it was an act of animus evidencing the disrespect and capriciousness of the Comptroller toward the Bank.

e. The Comptroller's Arbitrariness Is Also Evidenced by Capricious Manipulation of C.A.M.E.L. Ratings.

The Comptroller analyzes different areas of operation to determine the overall condition of a bank resulting in a "C.A.M.E.L." rating, an acronym based upon the areas analyzed – capital, assets, management, earnings and liquidity. (E.R. 596.) The OCC's examiners assign a number between one (the highest) and five (the lowest) for each area; then a formula produces a composite number indicating the strength of the bank. (E.R. 596.) Despite the Bank's solid financial performance, it received low C.A.M.E.L. scores, particularly following Blake's involvement. Regulatory documents indicate that the Bank consistently scored high in the objective areas of capital, assets, earnings and liquidity ("C.A.E.L."), (E.R. 896, 1276), but received very adverse scores in the subjective management area. For example, although the C.A.E.L. scores reached 1.78, the high management numbers skewed the C.A.M.E.L. rating so that the Bank never rated below a 4 after June 1988. The disparity between the objective and the subjective ratings evidences the anti-Semitic and personal animus of the OCC against the Bank's management.

The district court clearly erred by summarily adjudicating this case where a gaggle of genuine material issues arise surrounding the Comptroller's allegations of noncompliance and concealment, emphasized by the instances of anti-Semitism.

E. The *Bivens* Claims

The Second Amended Complaint alleges First Amendment violations against three of the OCC's examiners. (E.R. 760.) The district court's perceived lack of causation between the Petitioners' exercise of religion under the First Amendment and the Bank's closure, (App. 16, 18 & 20), was improper because for the causal link to exist, direct participation in the prohibited conduct is not necessary. The requisite causal connection may be satisfied if a defendant set in motion a series of events that he knew or should have known would cause others to deprive the plaintiff of constitutional rights. *Conner v. Reinhard*, 847 F.2d 384, 396-97 (9th Cir.), *cert. denied*, 488 U.S. 856, 109 S. Ct. 147 (1988). As demonstrated above, factual issues surround the causation analysis.

CONCLUSION

For the reasons stated above, Petitioners respectfully request that certiorari be granted.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICAN COMMERCE NATIONAL BANK,

Plaintiff-Appellant,

and

GERALD L. GARNER; JOAN G. GARNER; ROBYN ZIMMET, individually as trustee and on behalf of herself and all others similarly situated; WILLIAM KAVANAGH; JANET M. KAVANAGH; ROBERT YOUNG,

Plaintiffs,

v.

OFFICE OF THE COMPTROLLER OF THE CURRENCY; FDIC,

Defendants-Appellees.

GERALD J. GARNER; JOAN G. GARNER; ROBYN ZIMMET, individually as trustee and on behalf of herself and all others similarly situated; WILLIAM. KAVANAGH; JANET M. KAVANAGH; ROBERT YOUNG; HARVEY GARNER, individually

No. 97-56409

D.C. No. CV
93-6674 GHK

MEMORANDUM*

(Filed
Feb. 22, 1999)

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit, except as provided by Ninth Cir. R. 36-3.

as trustee and on behalf of himself and all others similarly situatee: GALAL S. GOUGH; DUFFERN H. HELSING; ROBERTA HELSING; THOMAS J. HEINZ; ROBERT ALAN JOSEPH; SHEILA JOSEPH; HAIM ASA; ELAINE ASA,

Plaintiffs-Appellants,

and

AMERICAN COMMERCE NATIONAL BANK,

Plaintiff,

v.

OFFICE OF THE COMPTROLLER OF THE CURRENCY; RICHARD BLAKE; GERALD FUJITA; RUFUS O. BURNS; FEDERAL DEPOSIT INSURANCE CORPORATION,

Defendants-Appellees.

No. 97-56412

DC No. CV
93-6674 GHK

Appeal from the United States District Court
for the Central District of California
George H. King, District Judge, Presiding.

Argued and Submitted December 7, 1998
Pasadena, California

Before: BEEZER, TASHIMA, and SILVERMAN, Circuit Judges.

American Commerce National Bank and certain of its officers and directors (collectively the "Bank") appeal the district court's grant of summary judgment in favor of the Office of the Comptroller of the Currency ("OCC" or

"Comptroller") and three individual *Bivens*[1] defendants who are former or current OCC employees. The Bank challenges OCC's decision to appoint the Federal Deposit Insurance Corporation as receiver for the Bank. It alleges that the closure of the Bank was arbitrary and capricious under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A), and that anti-Semitic bias motivated the closure decision. The Bank also challenges the grant of summary judgment on the Bivens claims, contending that the district court erred in finding an insufficient causal connection between the defendants' alleged anti-Semitism and the decision to close the Bank.

We have jurisdiction under 28 U.S.C. § 1291 and we affirm. The parties are familiar with the facts and we do not recite them.

I. The APA Claims

A. Exclusion of Extra-Record Evidence

We review a district court's decision to exclude extra-record evidence for an abuse of discretion. *See Alvarado Community Hosp. v. Shalala,* 155 F.3d 1115, 1124 (9th Cir. 1998). The Bank had an adequate opportunity to develop the record and has not demonstrated the applicability of any of the exceptions to the general rule that review of agency action is limited to the administrative record. *See Southwest Ctr. for Biological Diversity v. United States Forest Serv.,* 100 F.3d 1443, 1450 (9th Cir. 1996). The size and content of the administrative record, which consists of 19 volumes, is over 6,000 pages long, and contains many hundreds of pages of documents prepared by the Bank's board of directors and management, refute the Bank's contention that the OCC acted in bad faith or purposefully excluded evidence. The district court did not abuse its discretion in confining its scope of review to the administrative record.

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[1] The Bank brought claims based on alleged anti-Semitic conduct against the three individual defendants under *Bivens v. Six Unknown Named Agents,* 403 U.S. 388 (1971).

B. Summary Judgment

We review de novo the district court's grant of summary judgment and give deference to an administrative agency's interpretation of its own regulations. *See Del E. Webb McQueen Dev. Corp. v. Resolution Trust Corp.*, 69 F.3d 355, 358 (9th Cir. 1995). Our review of an agency determination is limited to whether the agency's action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or whether it was taken without observance of procedure required by law. *See Natural Resources Defense Council v. United States Dep't of Interior*, 113 F.3d 1121, 1123-24 (9th Cir. 1997). We review an agency's factual findings, however, under the substantial evidence test. *See DeLeon-Barrios v. INS*, 116 F.3d 391, 393 (9th Cir. 1997).

The Comptroller's decision to appoint a receiver for the Bank was neither arbitrary nor capricious on account of the Bank's multiple and continuing banking violations. The Comptroller's decision to close the Bank was made pursuant to 12 U.S.C. §§ 191 and 1821(c)(5)(E) and (H).

The OCC's seizure of the Bank, based on its post-FDICIA[2] conduct, including unsafe and unsound banking practices and concealment of information, papers, and records from the OCC, was not an abuse of discretion. There was ample evidence for the Comptroller to conclude that the Bank continued to conceal its records and information well into the spring of 1993, in violation of 12 U.S.C. § 1821(c)(5)(E). Ultimately, it was the Bank's final refusal to provide information that convinced the Comptroller to place the Bank into receivership. Likewise, there was ample evidence for the Comptroller to conclude that the Bank continued to have unsafe and unsound banking practices, such as the granting of preferential loans to insiders, in violation of 12 U.S.C. § 1821(c)(5)(H).

The appointment of a receiver for the Bank was not based on a retroactive application of 12 U.S.C. § 191. Despite the Bank's allegations that the OCC had been long planning the Bank's seizure, the actual decision to appoint a receiver was not made until the Comptroller signed the report and papers on April 30, 1993 – well after the FDICIA's effective date. Therefore, the OCC's decision to close the Bank was based on the Bank's post-FDICIA conduct.[3]

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[2] The Federal Deposit Insurance Corporation Improvement Act of 1991 ("FDICIA"), Pub. L. No. 102-242, Title I, 105 Stat. 2236, insofar as is relevant here, became effective on December 19, 1992, one year after the date of its enactment. *See id.* at § 133(g).

[3] We need not decide whether the FDICIA can be applied to conduct occurring before its effective date.

Finally, the OCC's decision to appoint a receiver for the Bank was not arbitrary or capricious due to alleged anti-Semitism, because there was insufficient evidence to prove that the defamatory conduct was so pervasive as to poison the OCC's decision-making authority. The Bank has failed to produce evidence that would permit this court to overturn the decision of the OCC on the ground of intentional religious discrimination. *See Kawaoka v. City of Arroyo Grande,* 17 F.3d 1227, 1239-40 (9th Cir. 1993) (holding that evidence of discriminatory intent consisting of racially biased statements was insufficient to overturn government action); *FDIC v. Henderson,* 940 F.2d 465, 471-72 (9th Cir. 1991) (holding that statement of racial bias was not enough to prove intentional racial discrimination).

Accordingly, we find no abuse of discretion in the OCC's decision to close the Bank.

II. The *Bivens* Claims

We evaluate a First Amendment retaliation claim by determining whether the plaintiff has shown that the protected conduct was a substantial or motivating factor in the defendants' action. *See Mount Healthy City School Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 287 (1977); *Clements v. Airport Auth.,* 69 F.3d 321, 334 (9th Cir. 1995).

The district court correctly found that the Bank did not provide sufficient evidence to prove that the conduct of defendants Fujita, Burns, and Blake was a substantial or motivating factor in the Bank's closure. Even taking all the Bank's allegations as true, the staggering weight of the OCC's record of the Bank's FDICIA violations, including a 126-page-long decision by the Comptroller and over 6,000 pages of supporting evidence in the administrative record, overwhelm any possible anti-Semitism engaged in by the defendants. The Bank has not shown that the OCC would not have closed the Bank without the alleged anti-Semitism. Accordingly, the district court did not err in granting of summary judgment in defendants' favor on the *Bivens* claims.

The judgment of the district court is

AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

AMERICAN COMMERCE NATIONAL BANK, et al.,
Plaintiffs,
vs.
OFFICE OF THE COMPTROLLER OF THE CURRENCY, et al.,
Defendants.

NO. CV 93-6674-GHK (JRx)

MEMORANDUM AND ORDER

(Filed May 10, 1996)

Introduction

Defendants Office of the Comptroller of the Currency and federal individuals (together, "OCC") move for summary adjudication against plaintiffs American Commerce National Bank ("the Bank"), Gerald Garner, et al. OCC also moves for continuance of the pretrial and trial dates. Defendant Federal Deposit Insurance Corporation ("FDIC") moves for summary adjudication on Claim IV of the Second Amended Complaint "Complaint") as against Lyle Parks, Jr. and Gerald Garner.

Having fully considered the parties' briefing, we determine that the motions are appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78; Local Rule 7.11.

I. OCC Motion For Summary Adjudication

OCC moves for summary adjudication on all three claims against them, including an alleged violation of the

Administrative Procedure Act ("APA") brought on behalf of the Bank, a declaratory relief claim based on same grounds as the APA claim, and *Bivens* claim against individual defendants for violation of plaintiffs' First Amendment rights to free exercise of the Jewish religion. *See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388, 91 S. Ct. 1999 (1971).

A. APA and Declaratory Judgment Claims

The case was engendered by the OCC's April 30, 1993 regulatory seizure of the Bank, which was apparently solvent although otherwise allegedly troubled. The closure and appointment of the FDIC as receiver were based on the Decision of the Comptroller of the Currency to Appoint a Receiver for American Commerce National Bank, Anaheim, California ("Decision Document"). *See* Administrative Record ("AR") 1-132. In support, the OCC tenders the administrative record ("AR") including twenty-two volumes of documents spanning the nine-year history of the Bank.

Plaintiffs allege that the statutory authorities relied on by the OCC to effect the closure were applied in an improperly retroactive manner so as to impair a right previously held by the Bank. *See Landgraf v. USI Film Products,* 114 S. Ct. 1483, 1499, 1505 (1994).[1] Pursuant to

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[1] The Supreme Court defines impermissible "retroactive" effect as follows:

> When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it

the statutory framework established in the National Bank Act ("NBA"), 12 U.S.C. §§ 1 *et seq.* and Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183, the OCC could not place a solvent bank into receivership without "particularly cumbersome"[2] mechanisms of pre-closure notice and hearing, although the OCC could close an insolvent bank without prior notice and hearing.

New powers granted in the Federal Deposit Insurance Corporation Improvement Act of 1991, ("FDICIA"), Section 133, *see* Pub. L. No. 102-242, 105 Stat. 2236 (amending NBA § 191 and FIRREA § 1821(c)(5)) permitted OCC, in certain circumstances, to appoint a receiver for a solvent bank without prior notice and hearing. As amended, § 191 allows appointment of a receiver if, in the Comptroller's discretion, any of the grounds in amended 12 U.S.C. § 1821(c)(5) are present. Grounds for appointing a receiver in § 1821(c)(5) include:

> ★ substantial dissipation of assets or earnings due to (1) any unsafe or unsound practice (2) any violation of statute or regulation;
>
> ★ unsafe or unsound condition to transact business;

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would impair rights a party possessed when he acted, increased a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result. *Id.*, 114 S. Ct. at 1505.

[2] *See* AR at 126.

- ★ concealment of, or refusal to provide, information to OCC examiners;
- ★ unlikeliness to be able to pay obligations or meet depositors' demands;
- ★ losses or likelihood of losses such that there is no reasonable prospect for adequate capitalization without Federal assistance;
- ★ and, any violation of law or regulation, or unsafe or unsound practice or condition, that is likely to: cause insolvency or substantial dissipation, weaken the bank's condition, or seriously prejudice the interests of its depositors or the deposit insurance fund.

The amendments to 12 U.S.C. §§ 191 and 1821(c)(5) were expressly made effective one year after the date of FDICIA's enactment, i.e. December 20, 1992. *Life Bancshares, Inc. v. Feichter*, 847 F. Supp. 434, 438 (M.D. La. 1993).

Among other arguments, defendants assert that the appointment of the receiver pursuant to the amended statutory sections was not necessarily based on retroactive application of the amendments because the Decision Document states that some conditions justifying the receivership continued to the time of the seizure. *See* AR 124; Finke Dec. ¶ 25 (AR 143). Due to such continuing violations, OCC argues that the Bank's condition on Dec. 20, 1992 and thereafter justified the receivership decision. *See also United States v. Morales*, 11 F.3d 915, 918 (9th Cir. 1993).

The court finds that further briefing on the factual basis of the "continuing offense" argument is required in this case. In a brief not to exceed ten pages in length, OCC is **ORDERED** to specifically identify all evidence, in the AR, of plaintiffs' conduct that transpired *on or after* the amendments' effective date, coordinated with each basis under 12 U.S.C. §§ 191 and 1821(c)(5) on which the OCC relies. The brief shall be filed and served within 15 days hereof. Plaintiffs shall file and serve their response of no more than ten pages in length within 15 days thereafter. Pending this supplemental briefing, we do not reach the parties' other retroactivity arguments, and reserve judgment as to whether the amendments may be applied to conduct prior to their effective dates.

B. BIVENS Claim

The *Bivens* claim is asserted against three former or current OCC employees who allegedly violated plaintiffs' First Amendment rights to free exercise of the Jewish religion. The alleged injury to plaintiffs was the deprivation of their rights to "the use and ownership of the Bank as a going concern." Complaint ¶ 110. The claim is thus grounded on the theory that defendants' alleged anti-Semitic conduct led to the seizure of the Bank. OCC moves for summary adjudication because "qualified immunity cannot be overcome unless plaintiffs can show that *but for* the alleged constitutional violation, the agency would not have taken the action it did." Mot. at 34, 37. Under defendants' analysis, plaintiffs would have to show that the decision to close the Bank was based solely on anti-Semitism. *See* Mot. at 42.

OCC is misinformed as to the applicability of the foregoing legal standard. The cases it relies on[3] do not support its position. *Veney* merely refers to a heightened evidentiary standard. *Branch, Hervey* and *Franks* are Fourth Amendment judicial deception cases, not First Amendment religious discrimination actions. The appropriate legal standard in the present *Bivens* action is that applied to claims for violation of First Amendment rights.[4] *See Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314-15 (9th Cir. 1989). The familiar *Mt. Healthy* causation standard applies.

The plaintiff alleging discrimination on the basis of exercise of a constitutionally protected right must show that the protected conduct was a "substantial" or "motivating" factor in defendants' adverse action. *See Soranno's Gasco*, 874 F.2d at 1314-15; *see also Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S. Ct. 568 (1977); *see also Clements v. Airport Auth. of Washoe County*, 69 F.3d 321, 334 (9th Cir. 1995) ("The standard for evaluating a First Amendment retaliation claim was established in *Mt. Healthy*. . . . ") If plaintiff meets this burden, the burden shifts to the defendant to establish that the adverse action would have occurred

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[3] *See Branch v. Tunnell*, 937 F.2d 1382, 1388 (9th Cir. 1991) (judicial deception case of alleged Fourth Amendment violation); *Hervey v. Estes*, 65 F.3d 784, 788-89 (9th Cir. 1995) (citing *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674 (1978) (judicial deception); *Veney v. Hogan*, 70 F.3d 917, 922 N.5 (6th Cir. 1995) (plaintiff has heightened production standard to meet defense of qualified immunity on First Amendment allegation).

[4] *Bivens* claims are analyzed in the same manner as analogous actions brought pursuant to 42 U.S.C. § 1983.

"even in the absence of the protected conduct." *Sorronno's* [sic] *Gasco* at 1314; *see also Sloman v. Tadlock,* 21 F.3d 1462, 1469, n. 10 (9th Cir. 1994) ("[Defendant] violated [plaintiff's] First Amendment rights if by his actions [defendant] deterred or chilled [plaintiff's] political speech and such deterrence was a substantial or motivating factor in [defendant's] conduct in issuing citations and warnings to him.") (citing *Mendocino Envtl. Ctr. v. Mendocino County,* 14 F.3d 457, 463-64 (9th Cir. 1994) (applying intent-based retaliatory discharge framework of *Mt. Healthy* to First Amendment claim)).

Thus, to survive summary adjudication plaintiffs must tender admissible evidence sufficient to allow a reasonable finder of fact to conclude that defendants' anti-Semitic conduct was a "substantial" or "motivating" factor in the Bank's closure. If they do so, under the *Mt. Healthy* structure the burden shifts to the OCC to establish that the closure of the Bank would have occurred despite anti-Semitism.[5]

1. Gerald Fujita

OCC's moving papers seek to point to an absence of admissible evidence in support of the proposition that Fujita's alleged anti-Semitic conduct was a substantial or motivating factor in the April 30, 1993 bank closure. OCC cites the Complaint's ¶ 33 acknowledgment that the OCC replaced Fujita with another examiner in spring of 1988.

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[5] In light of the record, we do not reach the question of whether a triable issue of material fact exists as to this "affirmative defense" aspect of the discrimination claim.

OCC likewise tenders multiple OCC reports – critical of the Bank – that post-dated Fujita's departure from the Bank's investigation team. *See* AR 379-447; 449-523; 525-67; 569-606; 625-729; 731-82; 784-833; 835-60; 862-904. Finally, OCC notes that the Decision Document does not rely on affidavits by Fujita.

Plaintiffs allege that Fujita commented in 1986 that the Bank's Board of directors had "a bad ethnic balance," enlisted the aid of successor examiners to "falsify" the AR, and deliberately excluded exculpatory evidence from the AR. Having examined the evidence tendered by plaintiffs, *see* Statement of Genuine Issues, ¶ 159, we find no substantive evidence in support of plaintiffs' falsification and exculpatory evidence assertions. Indeed, the evidence fails to show any involvement by Fujita in the investigation after 1988. Considering the evidence in the light most favorable to plaintiffs, the nexus between Fujita's alleged conduct and the Bank's closure is nonetheless far too attenuated to support a finding that Fujita's alleged anti-Semitism was a substantial or motivating factor in the April, 1993 closure. *See United States v. Erne*, 579 F.2d 212, 216 (9th Cir. 1978) (upholding district judge's refusal to order an evidentiary hearing on criminal defendant's motion to dismiss for discriminatory prosecution where IRS officer's alleged violations of defendant's first Amendment rights were too tenuously connected to decision to prosecute to taint the entire administrative process).

Accepting plaintiff's evidence as true[6], the court concludes as a matter of law that this evidence is insufficient to meet plaintiffs' summary adjudication burden of tendering evidence sufficient to support a finding in their favor by a reasonable trier of fact. Defendants' motion as to the *Bivens* claim is **GRANTED** as to Fujita.

2. Rufus Burns

Rufus Burns is the OCC Western Regional Director based in San Francisco who played a supervisorial role in the ongoing investigation of the Bank. Analysts working under Burns would review the findings of on-site OCC examiners and recommend OCC action regarding the Bank. Based on those recommendations and reports of examinations, in 1988 Burns assigned the Bank the second-lowest "CAMEL" financial rating of "4".

OCC points to an absence of evidence that Rufus Burns' alleged anti-Semitic conduct was a substantial or motivating factor of the Bank's closure by demonstrating that in February, 1993, direct supervision of the Bank was transferred from the Western Regional Office to the Office of Special Supervision in Washington, D.C. due to the Bank's precarious financial position. *See* AR 384. Moreover, the final closure decision was not made by Burns' regional office. OCC tenders evidence that prior to the seizure, Washington OCC employees independently reviewed the Bank's position and recommended the action. *See* AR 4167. The OCC's evidence thus establishes an absence of the element of causation with regard to Burns' alleged anti-Semitism and the OCC's decision to seize the Bank.

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[6] However, the court need not consider inadmissible hearsay in Dauser Decl. ¶¶ 4, 6-7, (former Bank employee) nor need we countenance plaintiffs' "general" citation to entire deposition transcripts of seven plaintiffs. *See Waldridge v. American Hoechst Corp.*, 24 F.3d 918, 920 (7th Cir. 1994) (" . . . the district court's role in deciding the [summary judgment] motion is not to sift through the evidence, pondering the nuances and inconsistencies, and decide whom to believe. The court has one task and one task only: to decide, based on the evidence of record, whether there is any material dispute of fact that requires a trial. [citations omitted] The parties, in turn, bear a concomitant burden to identify the evidence that will facilitate this assessment.")

Plaintiffs allege that Rufus Burns made anti-Semitic remarks about Gerald Garner ("the Jew with the Jewish Jewelry"), made intentionally arbitrary and capricious decisions evaluating the Bank's economic stability, and directed examiners and staff to unjustifiably and arbitrarily downgrade the financial rating of the Bank to a CAMEL "4".

On considering the evidence tendered by plaintiffs in support of these contentions, *see* Statement of Genuine Issues, ¶ 163-64, we conclude that plaintiffs do not raise a triable issue of fact as to whether Burns' behavior, even if fully proved, was a substantial or motivating factor in the Bank's closure. *See United States v. Erne, supra,* 576 F.2d at 216. Burns' alleged "arbitrary" reduction of the Bank's CAMEL rating in 1988 pre-dated the closure by over four years and also anteceded the Bank's subsequent rise to a "3" again while Burns was still in a supervisorial role. *See* AR, Vol 3, Ex. 2-C, p. 090528 (1990 ROE). Burns' alleged failure to respond to plaintiffs' complaints about Fujita, even if proved, cannot have substantially contributed to the OCC's closure decision if Fujita's own actions did not substantially cause that decision. Defendants' motion as to the *Bivens* claim is **GRANTED** as to Burns.

3. Richard Blake

Richard Blake is a former OCC attorney who was first assigned to the Bank case in 1990 by the OCC's Washington Division of Enforcement and Compliance. OCC points to an absence of evidence raising a triable issue of fact as to whether Blake's alleged anti-Semitic conduct was a substantial or motivating factor in the Bank's seizure and placement into receivership. OCC demonstrates that Blake was not a bank examiner, nor did he author the years of ROEs that repeatedly found the Bank in violation of laws and regulations and engaged in unsafe and unsound banking practices. OCC cites to the AR at 379-447; 449-523; 525-67; 569-606; 625-729; 731-82; 784-833; 835-60; 862-904. OCC further argues that the on-site examination of the Bank in July, 1992 involved many other investigators in addition to Blake.

To withstand the summary adjudication motion, plaintiffs purport to tender evidence that Blake attempted to "falsify" the administrative record, that he "artibrarily and capriciously" portrayed the Bank as a financially troubled institution, and that he "initiated the post-seizure, quasi-criminal administrative removal, prohibition and civil money penalty proceedings against plaintiffs to cover up his unconstitutional conduct." We find that plaintiffs' evidence does not support these allegations. *See* Statement of Genuine Issues, ¶ 161.

Plaintiffs cite a memorandum written by FDIC employee Norton Cook stating that Blake had told him that Blake had directed National Bank Examiner ("NBE") Mel Ekstrom to rate the Bank a CAMEL "5." *See* Silverman Decl., Ex. 49, p. 246. This identification of an internal OCC disagreement over a CAMEL rating hardly consists of a "direction" by Blake to OCC examiners to "falsify" exam records. Nor does plaintiffs' proffered evidence support inferences that Blake arbitrarily portrayed the Bank as a troubled institution or that the administrative proceedings were improper.

Plaintiffs' evidence that Blake's alleged anti-Semitism was a substantial or motivating factor in the Bank's closure hinges on his alleged anti-Semitic comments coupled with his participation in the on-site examination of the Bank and prominent role in writing the Decision Document. Tom Holliday, former lawyer to the Bank, testified at a deposition that Blake allegedly told him that Gerald Garner was part of the "Jewish Mafia." Holliday Depo., 21:4-25. Plaintiffs also tender evidence that when questioning a former Bank employee, Blake referred to ham sandwiches in an [sic] manner allegedly suggestive of anti-Jewish animus. *See* Garner Decl. May 8, 1994, Ex. 17. Plaintiffs proffer evidence that Blake wrote a significant part of the Decision Document and that in July, 1992, he accompanied a team of OCC and FDIC investigators on an unscheduled on-site examination of the Bank.

Viewed in its totality and in the light most favorable to plaintiffs, the proffered evidence is insufficient to raise a triable issue of material fact as to whether Blake's anti-

Semitic actions, if proved, were a substantial or motivating factor in the Bank's closure. Defendants' motion as to the *Bivens* claim is **GRANTED** regarding Blake.

II. OCC Motion To Continue

In light of our ruling on the other motions, the pretrial and trial dates are vacated pending resolution of OCC's summary adjudication motion as to the APA and declaratory judgment claims.

III. FDIC Motion For Summary Adjudication

FDIC moves for summary adjudication against plaintiffs Lyle Parks, Jr. and Gerald Garner on Claim IV for reassertion of receivership claims filed with FDIC and disallowed by that agency. *See* 12 U.S.C. § 1821(d)(6).

A. Parks' Claims

We first consider FIRREA's application to the termination of certain leases. As to the Parks claims, we find that the facts are not in dispute, and that the FDIC is entitled to judgment as a matter of law.

The Bank leased eight suites in an office building owned by Tustin La Palma Business Center ("Tustin"). After the April 30, 1993 closure, the FDIC repudiated the leases with Tustin, which were to expire in the year 2003.[7]

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[7] Section 12 U.S.C. § 1821(e)(1) grants FDIC power to repudiate contracts, including leases, to which a failed bank was

Parks filed three claims on behalf of Tustin: Claim No. 1, for common area charges, was allowed by the FDIC, which issued a Receiver's Certificate of Proof of Claim No. 105 to Parks for $2,672.15. Claim No. 3, for $3,092,624.42 in rental income that Tustin expected to lose as a result of the repudiation, was denied.[8]

FIRREA, *see* 12 U.S.C. § 1821(d)(3)-(6), establishes a system of resolving claims against financial institutions placed into receivership. Claims are filed with the FDIC, which determines whether to allow – § 1821(d)(5)(B) – or to disallow – § 1821(d)(5)(D) these claims. If a claim is allowed, the FDIC issues a Receiver's Certificate and the claimant receives dividends on the certificate, in conformance with statutes governing the distribution of assets from failed banks.

Title 12 U.S.C. § 194 of the National Bank Act governs distribution of assets from failed national banks placed in receivership through August 10, 1993, including the Bank. The statute provides that all proven or adjudicated claimants shall receive a pro rata distribution of assets from the bank, with any remaining assets paid to shareholders.

The evidence indicates that Claim 1 was fully allowed by the FDIC and a Receiver's Certificate of Proof

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party if the FDIC, in its discretion, determines that performance would be burdensome and repudiation will promote orderly administration of the bank's affairs. *See also Resolution Trust Corp. v. Ford Motor Credit Corp.*, 30 F.3d 1384, 1387 (11th Cir. 1994).

[8] Claim No. 2, for $5,333.78, is not the subject of this motion.

of Claim No. 105, dated August 18, 1993, in the amount of $2,672.15 was issued to Parks. Sullivan Decl. ¶ 5, Ex. 7.

Parks filed Claim No. 3 in his effort to recover "anticipated loss of income to Tustin-La Palma Business Center" for future rents and future tax and insurance monies. *See* Loss Schedule, Mesrop Decl., Ex. 1 at 11, 30-36. The total claim amount for Claim 3 was arrived at by subtracting Parks' anticipated receipts under new leases with Southern California Bank ("SCB"), the bank assuming some of the Bank's assets, from the receipts he expected to have collected under leases repudiated by the FDIC.

When the FDIC repudiates a lease, § 1821(e)(3)(B) excludes damages for lost profits or opportunity from damages that are recoverable by a party as a result of such repudiation. Section 1821(e)(4)(B)(i) only entitles a lessor to rent accruing before the later of (1) the date notice of repudiation is mailed or (2) date repudiation becomes effective. The operative date in this case is July 1, 1993, when the repudiation of the leases became effective.[9]

Evidence in the Mesrop Decl., Ex. 1 at 11, 30-36 shows that in Claim 3 Parks seeks rent accruing after the repudiation and covering the time period from July, 1993, to June, 2003. Claim No. 3 was properly denied pursuant to § 1821(e)(4) because it did not refer to rent accrued prior to the statutory dates. *See Bayshore Executive Plaza Partnership v. Federal Deposit Ins. Corp.*, 750 F. Supp. 507, 510 (S.D. Fla. 1990), *aff'd*, 943 F.2d 1290 (11th Cir. 1991); *see also LB Credit Corp. v. Resolution Trust Corp.*, 796 F. Supp. 358, 361 (N.D. Ill. 1992) (FIRREA allows the RTC to repudiate lease, and limits damages to rent payments accrued prior to repudiation and prohibits recovery of damages under any acceleration clause or other penalty provision of the lease); *Resolution Trust Corp. v. Ford Motor Credit Corp. supra*, 30 F.3d at 1387 (denying claim for future rents).

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[9] Shortly after closing the Bank on April 30, 1993, the FDIC sent Parks written notice that the leases would be repudiated effective July 1, 1993. Sullivan Decl. ¶ 3, Ex. 3. On or about July 8, Tustin entered into a new lease, with Southern California Bank, for some of the premises formerly leased by the Bank. Garner Decl. Ex. A at 4.

Parks' arguments against summary adjudication on Claim 3 are not persuasive. He states that (1) the FDIC was acting as both manager/landlord and receiver and therefore the FIRREA sections discussed above do not apply, and (2) due to bad faith on FDIC's part, it cannot qualify for protection under FIRREA.

Parks' reliance on *Homeland Stores, Inc. v. Resolution Trust Corp.*, 17 F.3d 1269, 1272-73 (10th Cir.), *cert. denied*, 115 S. Ct. 317 (1994), is unavailing. *Homeland* does not address the legal issue in the case at bar because Parks has already complied with the administrative claims procedure and now sues on the FDIC's denial of his claim. The case is moreover factually distinguishable. In *Homeland* the RTC maintained an active role in the lease arrangement as a manager/landlord **under an unrepudiated lease**. The court expressly stated that it was *not* considering the case "under the framework of § 1821(e) because that section is relevant only where the RTC expressly repudiates a contract." *Id.* at 1275 n. 6.

In this case, the FDIC repudiated the leases as of July 1, 1993. Parks' Claim 3 covers the period from July 1, 1993 to June 2003. *See* Loss Schedule, Mesrop Decl. Ex. 1, p. 31-36. During this entire period, the leases were repudiated and FDIC was not functioning as a landlord or tenant in its dealings with Parks. Parks' subsequent lease arrangements after the repudiation, on July 8, 1993, were not with the FDIC and were effective as of July 1, 1993.

Parks' bad faith argument posits that the FDIC forced Parks to accept Southern California Bank's lease deal because the FDIC acted as "negotiating agent" and "manipulated" Parks by bringing the new bank in immediately after the Bank was closed. There is no evidence in support of these contentions. In addition, Parks attempts to impose supposed obligations of good faith and fair dealing in leases that were repudiated as of July 1, 1993. Parks' Claim 3 does not concern any lease receipts accrued while these leases were in effect. As a matter of law, no good faith duties exist to support Claim 3.

Nor does Parks proffer evidence raising a triable issue of material fact as to bad faith. FDIC's promise to SCB to facilitate "the assumption, assignment, or sublease of leases or the negotiation of new leases by the Assuming Bank" does not, as Parks alleges, demonstrate the FDIC's bad faith. *See* Garner Decl. Ex. G. Caselaw supports FDIC's right to repudiate a lease after an assuming bank elects not to assume a lease then held by the FDIC. *See 1125 Avenue of the Americas Assocs. v. Resolution Trust Corp.*, 22 F.3d 494, 498 (2d Cir. 1994); *Resolution Trust Corp. v. United Trust Fund, Inc.*, 57 F.3d 1025, 1034 n. 10 (11th Cir. 1995).

Pursuant to the statutory structure discussed above, the FDIC properly administrated Parks' Claims 1 and 3. We **GRANT** the FDIC's motion for summary adjudication as to Parks regarding these claims.

B. Garner's Claim

Garner's claim, originally on behalf of all Bank shareholders, was limited by the prior judge, the Hon. Mariana Pfaelzer, to Bank stock held by Garner himself. Garner does not oppose the FDIC's motion for summary adjudication of the reassertion of his receivership claim. There are no issues of material fact in dispute. We find that Garner's claim is precluded as a matter of law because it is in violation of the express statutory scheme governing the manner and timing of distributions of receivership proceeds to shareholders.

This system ordains that shareholders of a failed bank are last in line to receive compensation for their investment; they must wait to be paid until all creditors and depositors of the failed institution have been paid in full. Shareholders are then compensated pro rata with other shareholders. *See* 12 U.S.C. § 194; *see also* 12 U.S.C. § 1821(d)(11)(B). The version of this section of FIRREA in effect when the Bank was closed and applicable in this case states, in pertinent part, "[i]n any case in which funds remain after all depositors, creditors, other claimants, and administrative expenses are paid, the receiver shall distribute such funds to the depository institution's shareholders or members."

To require the FDIC to reinstate Garner's claim would unsettle policies underlying the National Bank Act, as Garner is not a depositor, higher on the list of priority, but rather a shareholder. *See Downriver Community Fed. Credit Union v. Penn Square Bank,* 879 F.2d 754, 761 (10th Cir. 1989) National Bank Act policy required court to deny plaintiffs' claims against FDIC; policies included goal of achieving equality among creditors and the orderly liquidation of the receiver's estate). FDIC's motion is **GRANTED** as to Garner's claim.

IT IS SO ORDERED.

Dated: This 9th day of May, 1996

/s/ George H. King
GEORGE H. KING
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.: CV-93-6674-GHK(JRx) **Date:** July 18, 1996

Title: **AMERICAN COMMERCE NAT'L BANK**, et al., vs. **OFFICE OF THE COMPTROLLER OF THE CURRENCY**, et al.

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DOCKET ENTRY

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PRESENT: **Hon. George H. King, U.S. DISTRICT JUDGE**

Shelley Keir	None
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFF:	ATTORNEYS PRESENT FOR DEFENDANTS:
None Present	None Present

PROCEEDINGS: MINUTE ORDER (IN CHAMBERS)

The court has reviewed the parties' briefs and supporting documents on defendants' motion for summary adjudication. Defendants Office of the Comptroller of the Currency and federal individuals (together, "OCC") move for summary adjudication against plaintiffs American Commerce National Bank ("the Bank"), Gerald Garner, et al. We granted summary adjudication in favor of the individual defendants on the *Bivens* claim and in favor of the Federal Deposit Insurance Corporation ("FDIC") on a reassertion of receivership claim as against Lyle Parks, Jr. and Gerald Garner. *See* Order May 10, 1996. In the May 10 order, we ordered additional briefing on the Administrative Procedure Act ("APA") and declaratory relief claims, which are parallel claims grounded on the same allegations.

Upon consideration of the additional briefing, as well as the Notice to the Court and Parties Regarding New United States Supreme Court Decision[1], we have determined that the summary adjudication motion is appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78; Local Rule 7.11. We rule as follows:

OCC moves for summary adjudication on claims charging that the OCC violated the APA by improperly closing the Bank and appointing the Federal Deposit Insurance Corporation ("FDIC") as receiver. The OCC's seizure of the Bank, which was apparently solvent although otherwise troubled, occurred on April 30, 1993. The closure and appointment of the FDIC were based on the Decision of the Comptroller of the Currency to Appoint a Receiver for American Commerce National Bank, Anaheim, California ("Decision Document"). *See* Administrative Record ("AR") 1-132. In support of the decision document, the OCC tenders the administrative record ("AR").

1. Scope and Standard of Review

In ruling on the present motion, we review the federal agency's administrative action pursuant to the APA.

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[1] Plaintiffs referred the court to *United States v. Winstar Corp.*, 1996 WL 359767 (U.S.), a recent case which, while concerned with matters of federal bank regulation, is not on point.

Our review of the APA and declaratory relief claims is limited to scrutiny of the administrative record to determine whether the Comptroller's decision was arbitrary or capricious, contrary to constitutional right, in excess of statutory jurisdiction, procedurally defective, or unsupported by substantial evidence. *See* 5 U.S.C. § 706(2); *Camp v. Pitts,* 411 U.S. 138, 142, 93 S. Ct. 1241, 1244 (1973); *Southern California Edison Co. v. F.E.R.C.,* 770 F.2d 779, 782 (9th Cir. 1985). On judicial review of an agency decision, the standard for summary judgment is not whether there is a genuine issue of material fact, but rather, whether the agency action was arbitrary, capricious, an abuse of discretion, not in accordance with law, or unsupported by substantial evidence on the record taken as a whole. *Environment Now! v. Espy,* 877 F. Supp. 1397, 1421 (E.D. Cal. 1994) (citing *Good Samaritan Hospital, Corvallis v. Mathews,* 609 F.2d 949, 951 (9th Cir. 1979)). Moreover, plaintiffs have failed to establish a strong showing of bad faith or improper behavior justifying an expansion of the scope of review beyond the administrative record. *See Sierra Club v. Costle,* 657 F.2d 298, 390 n. 450 (D.C. Cir. 1981).

2. Statutory Basis For Agency Action

OCC maintains that new powers granted in the Federal Deposit Insurance Corporation Improvement Act of 1991, ("FDICIA"), Section 133, provided statutory authority for the regulatory seizure. *See* Pub. L. No. 102-242, 105 Stat. 2236 (amending National Bank Act ("NBA") § 191 and Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") § 1821(c)(5)). These amendments permit the OCC, in certain circumstances, to appoint a receiver for a solvent bank without prior notice and hearing. As amended, NBA § 191 allows for appointment of a receiver if, in the Comptroller's discretion, one or more of the grounds in amended 12 U.S.C. § 1821(c)(5) exist. *See* 12 U.S.C. § 191(1) (West Supp. 1996).[2] The amendments to 12 U.S.C. §§ 191 and 1821(c)(5) became effective on December 20, 1992. *Life Bancshares, Inc. v. Fiechter*, 847 F. Supp. 434, 438 (M.D. La. 1993).

Plaintiffs allege that the OCC applied the FDICIA amendments in an improperly retroactive manner to conduct preceding the amendments' effective date, thereby impairing rights to pre-deprivation notice and hearing enjoyed by the Bank prior to the amendments. Defendants maintain that the agency actions were properly grounded on conduct post-dating the amendments' effective date, and that therefore the court need not determine whether the amendments could lawfully be applied retrospectively. We ordered additional briefing on "all evidence, in the AR, of plaintiffs' conduct that transpired *on or after* the amendments' effective date, coordinated with each basis under 12 U.S.C. §§ 191 and 1821(c)(5)" for the OCC's closure of the Bank and appointment of the receiver. *See* Order, May 10, 1996, at 4.

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[2] Grounds for appointing a receiver pursuant to FIRREA § 1821(c)(5), include, *inter alia*:

- substantial dissipation of assets or earnings due to (1) any unsafe or unsound practice (2) any violation of statute or regulation;
- unsafe or unsound condition to transact business;
- concealment of, or refusal to provide, information to OCC examiners;
- unlikeliness to be able to pay obligations or meet depositors' demands;
- losses or likelihood of losses such that there is no reasonable prospect for adequate capitalization without Federal assistance;
- and, any violation of law or regulation, or unsafe or unsound practice or condition, that is likely to: cause insolvency or substantial dissipation, weaken the bank's condition, or seriously prejudice the interests of its depositors or the deposit insurance fund.

See 12 U.S.C. § 1821(c)(5) (West Supp. 1996).

After considering the parties' additional briefing and specific references to the AR, we conclude that OCC was entitled to take the regulatory actions, pursuant to the amendments and based on conduct by the plaintiffs that transpired after the amendments became effective. Consequently, we do not reach the question of whether the amendments in the FDICIA may be applied retroactively without violating plaintiffs' constitutional rights.

A. Subsection E

The OCC has identified evidence in the AR supporting its position that the Bank was in violation of 12 U.S.C. § 1821(c)(5)(E) after December 20, 1992. Subsection (E) establishes that the grounds for appointing a receiver include:

> Any concealment of the institution's books, papers, records, or assets, or any refusal to submit the institution's books, papers, records or affairs for inspection to any examiner or to any lawful agent of the appropriate Federal banking

> agency or State bank or savings association supervisor.

12 U.S.C. § 1821(c)(5)(E) (West Supp. 1996).

The AR establishes that the OCC's closure of the Bank and appointment of a receiver were properly based on subsection (E) in that, after December 20, 1992, the OCC required the Bank to provide certain banking records and the Bank failed to comply. The AR reflects that at the time of the closure, the Bank was still in noncompliance. The last examination of the Bank began on November 2, 1992 and concluded on January 7, 1993. *See* AR 151, 379. The Bank received the report of examination ("ROE") in February, 1993. AR 4170, Vol. 16, Tab 247. The ROE noted that the Bank was remiss in responding to the regulators' prior requests for information and records. AR 405. The ROE required the Bank to provide documentation pertaining to a wide variety of regulatory concerns. *Id.*[3] The OCC required the Bank to respond, completely, to these requests by March 22, 1993. AR 408; *see also* Tabs 246-47.

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[3] The OCC required documentation concerning, *inter alia*: litigation involving the Bank, including settlement agreements; legal billing statements; personal financial records for Daniel and Gerald Garner; loan files for Medi-Fin, Dal Rae restaurant, Maloney's Fine Dining and the KHO law firm; missing ownership documents for some of the preceding entities; complete responses to a prior OCC subpoena for a list of all accounts controlled by Gerald Garner; corporate documents for Associated Partners of Coast Plaza and Coast Plaza Doctors Hospital; documents concerning a revolving line of credit for Nu-Med, Inc.; information about insider interests in Mediquip Corp.; and a list of consulting fees paid by the Bank. *See* AR 405-08, Vol. III, Tab 2-A; AR 392-94.

In belated reaction to the ROE, the Bank offered six partial responses and a final response, beginning on March 23, 1993 and continuing to April 20, 1993. *See* AR Vol. 15, Tabs 240-43; Vol. 16, Tabs 244-45, 248. These responses did not provide the requested documentation, but, on the contrary, constituted (1) denials of wrongdoing, (2) protestations that the OCC's requests for information and documents were "unreasonable," or (3) promises to respond fully in the future. *See,* e.g., AR 4163-65; 4196-4201; 4235-38. The Bank's failure, after the effective date of the amendments, to provide the OCC with the requested documentation by the March 22, 1993 deadline constitutes proper grounds for the OCC's April 30, 1993 regulatory seizure. *See* 12 U.S.C. § 1821(c)(5)(E); *see also* AR 127-29; 142-43.

B. Subsection H

In addition, the AR shows that the OCC's closure of the Bank was also properly based on the existence, after December 20, 1992, of another of the grounds in 12 U.S.C. § 1821(c)(5). *See* AR 129-31. Subsection (H) of § 1821(c)(5) provides that grounds for appointing a receiver include:

> Any violation of any law or regulation, or any unsafe or unsound practice or condition that is likely to –
>
> (i) cause insolvency or substantial dissipation of assets or earnings;
>
> (ii) weaken the institution's position; or

> (iii) otherwise seriously prejudice the interests of the institution's depositors or the deposit insurance fund.

12 U.S.C. § 1821(c)(5)(H) (West Supp. 1996).

The AR identifies preferential loans to bank insiders as "substandard" loans constituting unsafe or unsound practices in violation of subsection (H). *See* AR 144; 387; *see also* 12 U.S.C. § 375b(2) (West Supp. 1996); 12 C.F.R. § 215.4(a)(1). One such loan, to Bank director Joan Garner in the amount of $595,000.00, was renewed by the Bank on January 15, 1993, after the effective date of the amendments. *See* AR 4245.

Other unsafe or unsound Bank conduct, previously identified by the OCC in the 1992 ROE, continued after the effective date of the FDICIA. Such conduct included the Bank's continued failure to comply fully with a Formal Agreement instituted between the Bank and regulators in 1989. *See* AR 24-26; 36; 109; 139; 165-66; 382; 386-91. Moreover, the AR indicates that after December 20, 1992, the Bank continued to be dominated and controlled by a single individual, and lacked competent management to supervise its loan portfolio. *See* AR 181-84.

The Bank conduct above, occurring after December 20, 1992, provided further grounds for the OCC's regulatory seizure, pursuant to the new powers established by the amendments in the FDICIA. *See* Pub. L. No. 102-242, 105 Stat. 2236, § 133; *see also* 12 U.S.C. § 1821(c)(5)(H). Evidence in the AR thus establishes that there were statutory bases entitling the OCC to close the Bank and appoint a receiver, pursuant to the amendments and predicated on plaintiffs' conduct *after* the amendments' effective date.

3. Conclusion

Having reviewed the AR and considered the arguments of the parties, we determine that the OCC's regulatory actions were not arbitrary or capricious, contrary to constitutional right, in excess of statutory jurisdiction, procedurally defective, nor unsupported by substantial evidence. *See* 5 U.S.C. § 706(2). On the contrary, the Comptroller's decision to close the Bank and appoint a receiver was reasonable and in accordance with law. Consequently, defendants' motion for summary adjudication of the APA and declaratory relief claims is **GRANTED**.

In light of our ruling, parties are ordered to file with the court, within ten (10) days hereof, a joint statement setting forth the status of any claims against OCC or FDIC that have yet to be finally adjudicated. If there are no outstanding claims, defendants are **ORDERED** to propose a judgment that incorporates each and every ruling of this court, as well as the prior court, and which reflects the disposition of each claim.

IT IS SO ORDERED.

MINUTES FORM 11
CIVIL-GEN **Initials of Deputy Clerk___**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

AMERICAN COMMERCE NATIONAL BANK, et al., Plaintiffs, vs. OFFICE OF THE COMPTROLLER OF THE CURRENCY, et al., Defendants.	NO. CV 93-6674-GHK (ANx) JUDGMENT (Filed Jul. 9, 1997)

Plaintiffs' motion for entry of a final judgment as against the Office of the Comptroller of the Currency ("OCC") and the individual federal defendants was granted pursuant to the court's minute order dated July 9, 1997.

Therefore, in accordance with the court's August 10, and October 25, 1994 Minute Orders, October 19, 1995 Memorandum and Order, May 10, 1996 Memorandum and Order, and July 18, 1996 Minute Order, it is hereby **ADJUDGED, DECREED** and **ORDERED** that plaintiffs' claim are **DISMISSED** as set forth in said orders.

The court expressly finds there is no just reason to delay entry of final judgment in favor of the OCC, the United States and the federal individual defendants on the claims set forth in the foregoing orders. In light of the fact that this final judgment will not completely dispose of this action, the court hereby directs the Clerk of the Court, pursuant to Fed. R. Civ. P. 54(b), to enter Final

Judgment in favor of these defendants and against plaintiffs on the claims set forth in the aforesaid orders.

DATED: July 9, 1997

/s/ George H. King
George H. King
United States District Judge

UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER OF THE CURRENCY

DECISION OF THE COMPTROLLER OF THE CURRENCY TO APPOINT A RECEIVER FOR AMERICAN COMMERCE NATIONAL BANK, ANAHEIM, CALIFORNIA

Table of Contents

A. *INTRODUCTION* 1

B. *BACKGROUND* 4

C. *THERE ARE VIOLATIONS OF LAW AND REGULATION AND UNSAFE AND UNSOUND PRACTICES AT THE BANK THAT ARE LIKELY TO CAUSE SUBSTANTIAL DISSIPATION OF ASSETS, EARNINGS, WEAKEN THE BANK'S CONDITION, AND OTHERWISE SERIOUSLY PREJUDICE THE INTERESTS OF THE BANK'S DEPOSITORS AND THE DEPOSIT INSURANCE FUND* 9

  1. *Violations Of Law And Regulation Governing Transactions With Bank Insiders Are Likely To Cause Substantial Dissipation Of Assets And Earnings And Weaken The Bank's Condition*... 9

    a. Loans to Director Joan Garner Violate Law and are Likely to Cause Substantial Dissipation of Assets and weaken the Bank's Condition..................... 11

    b. Loans to Coast Plaza Hospital Violate Law and are Likely to Cause Substantial Dissipation of Assets and Weaken the Bank's Condition..................... 12

    c. Loans to Associated Partners of Coast Plaza, Inc. Violate Law and are Likely to Cause Substantial Dissipation of Assets and Weaken the Bank's Condition 13

2. *Unsafe And Unsound Practices Involving Bank Insiders That Are Likely To Cause Substantial Dissipation Of Assets And Earnings And Weaken The Bank's Condition* 14
    a. Loans to Nu-Med, Inc. are Unsafe and Unsound and Unsound [sic] and are Likely to Cause Substantial Dissipation of Assets and Weaken the Bank's Condition.......................... 15
    b. Garner's Excessive Compensation is Unsafe and Unsound and Unsound [sic] and is Likely to Cause Substantial Dissipation of Assets and Weaken the Bank's Condition.......................... 16
    c. The Bank's Purchase of Key-Person Insurance is Unsafe and Unsound and Unsound [sic] and is Likely to Cause Substantial Dissipation of Assets and Weaken the Bank's Condition 17
    d. Fees Paid to Harvey Garner are Unsafe and Unsound and are Likely to Cause Substantial Dissipation of Assets and Weaken the Ban's Condition 18
3. *The Non-Compliance With The Formal Agreement Is An Unsafe And Unsound Practice That Is Likely To Cause Substantial Dissipation Of Earnings And Weaken The Bank's Condition*... 18
4. *The Unsafe And Unsound Practices In Loan Administration Are Likely To Cause Substantial Dissipation Of Earnings And Weaken The Bank's Condition* 20
    a. Failure to Obtain and Analyze Current Credit Information is an Unsafe and Unsound Practice Which is Likely to Cause Substantial Dissipation of Assets and Earnings and Weaken the Bank's Condition.......................... 20

5

b. Failure to Ascertain the Value of Collateral is an Unsafe and Unsound Practice Which is Likely to Cause Substantial Dissipation of Assets and Earnings and Weaken the Bank's Condition 22

c. The Bank's Loan Approval Process Exposes the Bank to Undue Risk of Loss, and is an Unsafe and Unsound Practice Which is Likely to Cause Substantial Dissipation of assets and Earnings and Weaken the Bank's Condition 23

d. The Bank's Loan Review and Problem Loan Identification Exposes the Bank to Undue Risk of Loss, and is an Unsafe and Unsound Practice Which is Likely to Cause Substantial Dissipation of Assets and Earnings and Weaken the bank's Condition.......................... 24

5. *The Failure To Maintain An Adequate Allowance For Loan And Lease Losses Is An Unsafe And Unsound Practice That Is Likely To Cause Substantial Dissipation Of Earnings And Weaken The Bank's Condition......................* 26

6. *The Bank's Failure To Have Adequate Liquidity Is An Unsafe And Unsound Practice That Will Likely Cause Substantial Dissipation of Earnings And Weaken The Bank's Condition ....* 28

7. *Management And the Board Engage In Unsafe And Unsound Practices That Are Likely To Cause Substantial Dissipation Of Assets And Earnings And Weaken The Bank's Condition...* 29

a. Management and the Board Have Not Acted to Achieve Compliance With the Formal Agreement 30

b. Management and the Board Have Not Acted to Address the Weaknesses and Deficiencies Noted in Reports of Examination.............................. 30

c. Board and Management Acceptance of Poor Internal Reports is an Unsafe and Unsound Practice That is Likely to Cause the Substantial Dissipation of Assets and Earnings and Weaken the Bank's Condition.............................. 31

d. It is an Unsafe and Unsound Practice to Withhold From the President the Authority and Responsibility Necessary to Perform His Duties 32

D. *THE BANK IS IN UNSAFE AND UNSOUND CONDITION TO TRANSACT BUSINESS* 32

1. *The Condition Of The Bank's Loan Portfolio Is Critical And Is Expected To Deteriorate*....... 32

2. *The Bank's Earnings Are Weak, And Threaten The Bank's Viability*...................... 33

3. *The Bank's Capital Is not Adequate*........... 36

4. *Bank Management and Directorate* 37

E. *THE BANK HAS AND CONTINUES TO CONCEAL PAPERS AND RECORDS OF THE BANK, AND HAS REFUSED AND CONTINUES TO REFUSE TO SUBMIT PAPERS, BOOKS, AND AFFAIRS OF THE BANK FOR INSPECTION BY THE OCC* 38

1. *Garner Submitted False Confidential Biographical And Financial Reports To The OCC In 1983 And 1984* 39

2. *Daniel Garner's Position As An Executive Officer Was Concealed From Examiners* 41

3. *The Bank Concealed Daniel Garner's 1988 Bankruptcy* 46

4. *The Bank Refused To Provide Daniel Garner's 1988 Financial Statement To Examiners* 50

5. *Daniel Received Loans From The Bank In Violation Of Statutes and Regulations Governing Insider Related Transactions At The Time The Bank Concealed His Executive Officer Status and Bankruptcy* 53

    Loan # 1 54

    Loan # 2 56

    Loan # 3 57

    Loan # 4 58

    Loan # 5 59

6. *Garner Concealed His Ownership In KHO, Circumventing Restrictions Of 12 U.S.C. § 375b And 12 C.F.R. § 215* 61

7. *Directors Concealed Their Interest In Associated Partners Of Coast Plaza* 64

8. *The Bank Concealed Bank Records Relating To Garner's 1991 $100,000 Bonus* 67

9. *The Bank refused To Provide Documentation Relating To The Medi-Fin Account* 71

10. *The Bank Refused To Provide Documentation Relating To The Dal Rae Restaurant Account* ... 72

11. *The Bank Refused To Provide Examiners With A Management Study Performed By An Outside Consulting Firm* 73

12. *The Bank Refused To Provide Ownership Information For The Mediquip Account* 74

F. *VIOLATIONS OF LAW OR REGULATION AND UNSAFE AND UNSOUND PRACTICES THAT HAVE RESULTED IN SUBSTANTIAL DISSIPATION OF THE BANK'S ASSETS OR EARNINGS* 76

1. *Definition Of Unsafe And Unsound Banking Practices* 76

2. *The Bank Filed A Frivolous Lawsuit Constituting An Unsafe And Unsound Action That Resulted In Dissipation Of The Bank's Assets* 77

3. *Bank Insiders' Involvement In Maloney's Fine Dining Was Unsafe And Unsound. In Violation Of 12 U.S.C. §§ 375a, 375b, 12 C.F.R. §§ 215, 31, And Resulted In The Dissipation Of The Bank's Assets* 81

4. *The Bank's Payment Of Garner's Personal Legal Expenses In Relation To His New York Disbarment Proceeding Violated 12 C.F.R. § 7.5217 And Was An Unsound Practice That Resulted In The Dissipation Of Bank Assets* 96

G. *OTHER MATTERS* 101

1. *The OCC Has Reviewed The Bank's Responses To The September, 1992 ROE* 101

2. *Receivership Is The Proper Action To Take In This Instance* 114

3. *12 U.S.C. § 1821(c)(5) Applies To Actions By The Bank Prior To And Subsequent To December 19, 1992* 118

H. *CONCLUSION* 121

UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER OF THE CURRENCY

DECISION OF THE COMPTROLLER OF THE CURRENCY TO APPOINT A RECEIVER FOR AMERICAN COMMERCE NATIONAL BANK, ANAHEIM, CALIFORNIA

A. INTRODUCTION

Pursuant to 12 U.S.C. § 191, the Comptroller of the Currency of the United States of America ("Comptroller") hereby determines that it is appropriate to appoint a receiver to take possession and control of American Commerce National Bank, Anaheim, California ("Bank") for the reasons set forth in this Decision.

The Office of the Comptroller of the Currency ("OCC") is the bureau of the Treasury Department with primary supervisory responsibility over national banks. *See* 12 U.S.C. §§ 1 *et seq.* As part of its supervisory responsibilities, the OCC must determine whether grounds exist to close a national bank and to appoint the Federal Deposit Insurance Corporation ("FDIC") as receiver. 12 U.S.C. §§ 191, 1821(c)(5).

Section 191 was amended[1] by the Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L.

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[1] Before FDICIA was enacted, section 191 provided, in relevant part:

> [W]henever the Comptroller shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs appoint a receiver, who shall proceed to close up such association.

No. 102-242, Title I, § 133 ("FDICIA"). Section 133 of the FDICIA broadened the grounds for appointing receivers for national banks to make the grounds consistent with those for other financial institutions insured by the Federal Deposit Insurance Corporation. S. Rep. No. 167, 102d Cong., 1st Sess. 42 (1991). Section 191, as amended, provides:

> The Comptroller of the Currency may, without prior notice or hearing, appoint the Federal Deposit Insurance Corporation as receiver for any national banking association if the Comptroller determines, in the Comptroller's discretion, that –
>
> (1) 1 or more of the grounds specified in section 1821 (c) (5 of this title exist; or
>
> (2) the association's board of directors consists of fewer than 5 members.

Among the grounds listed in 12 U.S.C. § 1821(c)(5) for appointment of the FDIC as a receiver or conservator are:

> (B) Substantial dissipation of assets or earnings due to
>
> (i) any violation of any law or regulation; or
>
> (ii) any unsafe or unsound practice;
>
> (C) An unsafe or unsound condition to transact business;
>
> (E) Any concealment of books, papers, records, or assets, or any refusal to submit books, papers, records, or affairs of the institution for inspection to any examiner . . . ; and

> (H) Any violation of any law or regulation, or an unsafe or unsound practice or condition that is likely to cause insolvency or substantial dissipation of assets or earnings, or is likely to weaken the condition of the institution or otherwise seriously prejudice the interests of its depositors.

As set forth in this Decision, the following grounds exist to appoint a receiver to take possession and control of the Bank:

1. The Bank's assets or earnings have been substantially dissipated due to violations of statutes and regulations and due to unsafe and unsound practices;

2. The Bank, its directors, officers, and agents have concealed the Bank's books, papers, records, or assets, and have refused to submit the institution's books, papers, records, or affairs for inspection to bank examiners;

3. There are violations of law and regulations, and unsafe or unsound practices or conditions that are likely to cause insolvency or a substantial dissipation of the Bank's assets or earnings, weaken the Bank's condition, and otherwise seriously prejudice the interests of the Bank's depositors or the deposit insurance fund; and

4. The Bank is in an unsafe or unsound condition to transact business.

As discussed below in detail, the existence in the Bank of each of these factors standing independently, warrants closing the Bank and appointing the FDIC as receiver. My determination that these grounds exist for placing the Bank into receivership is based upon information provided to me by OCC staff in the performance of their duties and contained in the official records of the OCC; the facts contained in the declarations of Mel Ekstrom, National Bank Examiner ("Ekstrom Declaration"), Duane J. Duchscherer, National Bank Examiner ("Duchscherer Declaration"), James Scherf, National Bank Examiner ("Scherf Declaration"); Daniel L. Pearson ("Pearson Declaration"); Frank Bernal ("Bernal Declaration."), and the affidavits of John P. O'Brien, Esq. ("O'Brien Affidavit"), Dr. Donald J. Daniel ("Dr. Daniel Affidavit"), Donald J. Maloney ("Maloney Affidavit"), Redarle S. Baker ("Baker Affidavit"), Rebecca L. Holmes ("Holmes Declaration"), Lynn Kirk ("Kirk Affidavit"), and the recommendation contained in the declaration of Fred D. Finke, Deputy Comptroller for Special Supervision ("Finke Declaration").

As discussed below, the Bank's board and management have a long standing, documented and continuing practice of concealing information about the Bank's affairs from its primary regulator, and violating+ laws and regulations and engaging in numerous, egregious, insider abuses and other unsafe and unsound practices that have resulted, and will continue to result in substantial dissipation of the Bank's assets and earnings. These practices are weakening and will continue to weaken the Bank's condition and have seriously prejudiced, and will continue to prejudice the interest of the Bank's depositors. Finally, the Bank is in an unsafe and unsound condition to transact business. Each of these factors individually is sufficient to support the determination to appoint the FDIC as receiver for the Bank. Taken together, these factors leave the OCC with no viable option other than to appoint the FDIC as receiver for the Bank.

B. BACKGROUND

The Bank opened on February 29, 1984, and is located in Anaheim, California. As of March 31, 1993, the Bank reported that it had total assets of $139 million and a leverage capital ratio of 7.5%. Ex. 28.

The board of directors is composed of Gerald Garner, Joan Garner (Gerald Garner's wife), Duffern Helsing, Stanley Kaller, Judy Mandel, Galal Gough, Norman Charney, Eugene Alterman, and Michael Hales (president of the Bank). All of the directors, with the exception of Michael Hales, have been directors of the Bank since its inception in February, 1984. Ekstrom Decl. ¶ 9.

As set forth in this Decision, the ongoing supervision of the Bank by the OCC reveals that the Bank is in an extremely unsatisfactory condition. The OCC has assigned a composite CAMEL rating of "5" to the Bank in accordance with the Uniform Financial Institutions Rating System ("UFIRS").[2] Pursuant to the UFIRS, a "5" rating is reserved for institutions with a critical volume and severity of weaknesses and unsafe and unsound conditions and an extremely high immediate or near term probability of failure.

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[2] "CAMEL" is an acronym for Capital, Asset Quality, Management, Earnings, and Liquidity. CAMEL ratings range from "1" to "5" with "1" being the best rating an institution can receive and "5" the worst. The UFIRS is a rating system recommended by the Federal Financial Institutions Examination Council to provide a general framework for evaluating and assimilating all significant financial, operational and compliance factors in order to assign a summary or composite supervisory rating to each federally regulated commercial bank, savings and loan association, mutual savings bank and credit

The Bank is controlled and dominated by Chairman of the Board and Chief Executive Officer Gerald Garner ("Garner") and his brother, Executive Vice President Daniel Garner ("Daniel"). Ekstrom Decl. ¶¶ 8, 45, 85; Duchscherer Decl. ¶ 6; Dr. Daniel Aff. ¶¶ 22-26; Holmes Aff. ¶¶ 11, 37. Since the Bank opened in February, 1984, they, and certain other Bank directors, have engaged in a pattern of illegal and unsafe and unsound practices, many of which have been concealed from examiners. These actions have directly contributed to the Bank's extremely unsatisfactory condition. Ekstrom Decl. ¶¶ 85-92; Duchscherer Decl. ¶ 5; Scherf Decl. ¶ 9.

The Bank has been cited for violations of laws pertaining to insider activities in every Report of Examination ("ROE") since 1985. Ekstrom Decl. ¶ 19. The Bank's condition has steadily declined as the board has continually failed to address OCC recommendations and warnings relating to matters of significant concern to the agency. Ex. 2-A, 4. The board and senior management have consistently refused to comply with OCC supervisory actions and have been unwilling to cooperate with

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union. The purpose of the rating system is to reflect in a comprehensive and uniform fashion an institution's financial condition, compliance with laws and regulations and overall operating soundness. Use of the UFIRS was approved by the OCC in 1979. (*See* OCC Examining Circular EC-159 (REV), dated December 10, 1979.)

examiners. Ekstrom Decl. ¶ 19; Duchscherer Decl. ¶ 6. The overall condition of the Bank has continued to deteriorate to a point where its viability is threatened. Ex. 2-A, 1.

The Bank has a history of concealing information, misleading examiners with false information, and creating false Bank records. Duchscherer Decl. ¶ 5; Scherf Decl. ¶¶ 7, 9; Dr. Daniel Aff. ¶¶ 21, 27; Holmes Aff. ¶¶ 3-15, 31, 36, 39.

Due to the Bank's pattern of misleading examiners and of concealing information from examiner review, a complete and full examination of the Bank has not been possible through the normal examination process. Much of the insider abuse cited in this Decision remained undisclosed to the OCC and came to light only after examiners obtained information from parties outside the Bank. In response, the OCC Washington Office, on May 21, 1992, authorized the OCC Enforcement and Compliance Division ("E&C") to institute an Order of Investigation of insider activities and violations of law in the Bank ("1992 Investigation"). Given the difficult and complex nature of the investigation, due in large part to the Bank's ongoing concealment and falsification of Bank records, E&C assembled an experienced team of examiners with specialized knowledge in uncovering insider abuses to assist with the 1992 Investigation.

As part of the 1992 Investigation, and pursuant to the Order of Investigation authorized by the Washington Office, OCC personnel, with the assistance of examiners from the FDIC, conducted an unscheduled on-site examination of the Bank in July, 1992.[3] On the morning of the first day of the on-site examination, one agent from the Federal Bureau of Investigation and two agents from the Secret Service accompanied the examination team into the Bank.[4] The 1992 Investigation disclosed a pattern of extensive insider abuse and violation of law by the board and senior management. In addition to uncovering activities previously undisclosed up to that time, the 1992 Investigation examined in greater detail, a number of matters cited during previous examinations that had not been fully developed due to inaccurate Bank records and misleading statements by the board and senior management. Many of the activities described in this Decision were not fully discovered until the 1992 Investigation.

Although a number of the activities described in this Decision occurred in the mid to late 1980s, they were not discovered and/or fully documented until after the 1992 Investigation. Moreover, the activities are relevant to this Decision since they illustrate a pattern on the part of the board and senior management of willfully violating laws and regulations, operating the Bank in an unsafe and unsound manner, and demonstrating the board's and senior management's attempt to conceal their activities in order to advance their personal interests. The acts discovered during the 1992 Investigation and described in this Decision clearly demonstrate willful misconduct on the part of the board and senior management and have directly contributed to the Bank's extremely unsatisfactory condition.

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[3] The OCC did not issue a formal Report of Examination to the Bank detailing the findings of the on-site examination, nor was it required to. Many of the findings of the examination were followed up on during the September, 1992 examination and brought to the Bank's attention in the September, 1992 ROE.

[4] The FBI agent was on-site in the event that Bank officials refused to allow examiners access to Bank files. 18 U.S.C. § 1517. The Secret Service agents were on-site to ensure the safety of the examination team. The three agents did not participate in the examination and left the Bank several hours later.

Examiners are unable to rely on the integrity or truthfulness of information provided by the Bank and have been denied access to information. Therefore, the extent of the weaknesses, and the Bank's true condition cannot be documented. Ekstrom Decl. ¶ 106; Duchscherer Decl. ¶ 5. Although the evidence fully supports the Bank's "5" rating, the OCC is convinced that the actual condition of the Bank is far worse than can be documented at this time. These factors, together with the high level of illegal and abusive insider activities and continued unsafe and unsound practices by the Garners and other directors and management described below, as well as numerous other egregious actions that are not specifically addressed in this Decision have forced the Comptroller to initiate prohibition actions[5] against every member of the board, including the president, Michael Hales ("Hales"), as well as against Senior Vice President Daniel Garner ("Daniel"), Chief Financial Officer Robert Duncan ("Duncan"), Senior Lending Officer William Kavanagh ("Kavanagh"), and Senior Credit Administrator Robert Young, ("Young"). Ex. 256. The only member of senior management not served with a notice at this time is the Bank's cashier.

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[5] 12 U.S.C. § 1818(e) authorizes the OCC to remove an individual from office and to prohibit any further participation by such individual, in any manner, in the conduct of the affairs of any insured depository institution, any institution treated as an insured bank or savings association, any insured credit union, any institution chartered under the Farm Credit Act, any appropriate Federal depository institution regulatory agency, the Federal Housing Finance Board, the Resolution Trust Corporation, and any Federal home loan bank.

C. THERE ARE VIOLATIONS OF LAW AND REGULATION AND UNSAFE AND UNSOUND PRACTICES AT THE BANK THAT ARE LIKELY TO CAUSE SUBSTANTIAL DISSIPATION OF ASSETS, EARNINGS, WEAKEN THE BANK'S CONDITION, AND OTHERWISE SERIOUSLY PREJUDICE THE INTERESTS OF THE BANK'S DEPOSITORS AND THE DEPOSIT INSURANCE FUND.

1. Violations Of Law And Regulation Governing Transactions With Bank Insiders Are Likely To Cause Substantial Dissipation Of Assets And Earnings And Weaken The Bank's Condition.

The September, 1992 examination revealed the Bank's continuing practice of violating laws and regulations that govern transactions with insiders and insider related interests.[6]

These violations have resulted and will likely continue to result in the dissipation of earnings, weaken the bank's condition and prejudice the interests of the depositors and the insurance fund.

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[6] As stated *supra* at 6, insider related transactions have been criticized in every report of examination since 1985.

Insider abuses were the overriding target of the 1978 provisions that are codified at 12 U.S.C. 375a and 375b.[7] The House Report on the bill, replete with references to the importance of ferreting out insider self-dealing, stressed that improper borrowing is a prevalent form of insider abuse and the leading factor in bank failures:

> Under current law, few restrictions exist on insider loans. This has created a banking system in which an insider or group of insiders, if they want to use their institution's funds for their own purposes, rather than providing services for a wider community, can borrow almost unlimited amounts of funds on terms and conditions which other nonaffiliated individuals may not be able to secure. Not only can this create discriminatory anticompetitive lending policies, but it has been the leading factor in bank failures.

H.R. Rep. No. 1383, 95th Cong., 2d Sess. 10 (1978), reprinted in [1978] U.S. Code Cong. & Ad. News 9279, at 9282.

12 U.S.C. 375a and 375b provide generally that extensions of credit to executive officers, directors and their related interests be made on substantially the same terms as available to other borrowers, and not involve more

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[7] These provisions were enacted in 1978 as part of the Financial Institutions Regulatory and Interest Rate Control Act of 1978 ("FIRA"), Pub. L. No. 95-630, section 110, 92 Stat. 3665.

than the normal risk of repayment or present other unfavorable terms; that loans to executive officers, directors and their related interests be approved in advance by a majority of the entire board of directors with the interested party abstaining from participating, directly or indirectly in the voting; and that total loans to executive officers other than home mortgages and education loans may not exceed $100,000.

a. Loans to Director Joan Garner Violate Law and are Likely to Cause Substantial Dissipation of Assets and Weaken the Bank's Condition

At the September, 1992 examination the OCC classified more than $1.4 million in loans to Director Joan Garner as Substandard.[8] Ex. 2-A, 52.[9] The Substandard loans by definition, pose more than the normal risk of loss to the Bank, are likely to cause substantial dissipation of the Bank's assets or earnings, likely to weaken the Bank's condition and violate 12 U.S.C. 375b.

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[8] Substandard loans are inadequately protected by the current sound worth and paying capacity of the obligor or the collateral pledged. Substandard loans have one or more well defined weakness that jeopardize the liquidation of the debt. They have the distinct possibility that the bank may sustain some lose if the deficiencies are not corrected. *Comptroller's Handbook for National Bank Examiners, Section 215.*

[9] Management, disagreed with the OCC classification on the belief that Joan Garner has cash available at other institutions and sufficient additional liquidity, mainly from family trusts, to service her debt. Garner promised additional information, but, to date, it has not been forthcoming. Joan Garner's cash in the Bank is in Individual – Retirement Accounts (IRAs) that are not considered liquid or readily available because of substantial tax penalties upon early withdrawal. Joan Garner's financial statement of February 28, 1992 gave only estimates of assets, liabilities, income, and

The loans were made on preferential terms – terms not available to other Bank customers. One loan even calls for principal payments to be made not on a schedule established by the Bank, but at the discretion of Director Joan Garner. Ex. 2-A, 53. The ability of Director Joan Garner to repay the loans is not supported by documentation. The Bank also capitalized interest totaling $11,465 on two loans to Director Joan Garner. The terms of the loans to Director Joan Garner violate 12 U.S.C. 375b, are likely to cause substantial dissipation of the Bank's earnings and are likely to weaken the Bank's condition.

Late fees totaling $21,000 during the first ten and a half months of 1992 were waived for Director Joan Garner's loans. In essence, the Bank gave up $21,000 of income. Ex. 7.

Because the Bank has no policy on the waiver of late fees. these waivers constitute preferential treatment to an insider. In addition, waivers of this sort dissipate the Bank's earnings, are likely to weaken the Bank's condition and violate 12 U.S.C. 5 375b. Ex. 2-A, 7.

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expenses; contingent liabilities were not stated. OCC estimates indicate expenses exceed income, resulting in a negative cash flow. Further, Joan Garner has not made payments on her debt in a timely manner. Ex. 2-A, 52-53.

b. Loans to Coast Plaza Hospital Violate Law and are Likely to Cause Substantial Dissipation of Assets and Weaken the Bank's Condition

Garner is the Can of Coast Plaza Doctor's Hospital ("Coast") and, as such, has the power to exercise a controlling influence over the management and policies of Coast. Coast is therefore an insider related interest. 12 U.S.C. 375b.

In 1992, Garner personally approved overdrafts to Coast. The overdrafts to Coast totaled at one point $252,000. Garner did not obtain, and Bank records do not reflect, an ability on the part of Coast to repay these overdrafts. These overdrafts, without any evidence of the borrower's ability to repay, are illegal, preferential, high risk extensions of credit to an insider related interest, are likely to dissipate bank earnings and weaken the condition of the Bank.

In addition to approving overdrafts, Garner authorized the waiving of fees for Coast's overdrafts. At the September, 1992 examination, the OCC documented that $11,300 in overdraft fees were waived from April through June, 1992. Ekstrom Decl. ¶ 24. In so doing, the Bank gave up $11,300 of income. The waiver of fees is a preferential treatment to an insider related interest, violates 12 U.S.C. 375a, is a significant dissipation of earnings, and is likely to weaken the condition of the Bank.

c. Loans to Associated Partners of Coast Plaza, Inc. Violate Law and are Likely to Cause Substantial Dissipation of Assets and Weaken the Bank's Condition

Documents obtained outside the Bank show that Associated Partners of Coast Plaza, Inc., ("Associated") is 25% owned by Director Galal Gough, 25% owned by Director Stanley Kaller and 25% owned by trusts for Garner's children. Ex. 23. Director Joan Garner is the trustee for the trusts that own 25% of Associated. Duchscherer Decl. ¶ 118. Thus, Associated is an insider related interest. 12 U.S.C. § 375b. More than $660,000 in loans and contingent loans to Associated were classified as Substandard at the September, 1992 examination. Ex. 2-A, 40-41. Substandard loans, by definition, pose more than the normal risk of loss to the Bank, are likely to cause substantial dissipation of the Bank's assets and earnings, likely to weaken the Bank's condition and violate 12 U.S.C. 375b.

2. Unsafe And Unsound Practices Involving Bank Insiders That are Likely To Cause Substantial Dissipation Of Assets And Earnings And Weaken The Bank's Condition.

The September, 1992 examination revealed continuing unsafe and unsound practices in connection with transactions with insiders and insider related interests. These unsafe and unsound practices have resulted, and will likely further result in the substantial dissipation of assets and earnings, have weakened the bank's condition and have prejudiced the interests of the depositors and the insurance fund.

An unsafe and unsound banking practice "embraces any action, or lack of action, which is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk of loss or damage to an institution." Congress adopted this definition when it passed the Financial Institutions Supervisory Act of 1966. Hearings on S. 3158 and 3695 before the House Committee on Banking and Currency, 89th Cong., 2d Sess. 49-50 (September 15, 20 and 22, 1966) SD-122. Courts have also relied on this definition to determine whether practices are unsafe or unsound. *See, e.g., First Nat. Bank of Eden v. Dept. of Treasury*, 568 F.2d 610, 611 (8th Cir. 1978).

a. Loans to Nu-Med, Inc. are Unsafe and Unsound and Unsound [sic] and are Likely to Cause Substantial Dissipation of Assets and Weaken the Bank's Condition.

Nu-Med, Inc. ("Nu-Med") is an acute care facility with total borrowings of $1.25 million that were classified Doubtful[10] at the September, 1992 examination. The Nu-

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[10] An asset classified doubtful is inadequately protected by the current sound worth and paying capacity of the obligor or of the collateral pledged, has a well defined weakness or weaknesses that make collection or liquidation in full, on the basis of currently existing facts, conditions and values, highly questionable and improbable. The possibility of loss is extremely high, but because of certain important and reasonably specific pending factors that may work to the

Med loans are secured by receivables of Coast, the related interest of Garner. Ex. 2-A, 60. The Bank's Loan Committee, including Garner, voted to approve the renewal of the Nu-Med loan on August 13, 1992 without reviewing available information on Nu-Med's ability to repay the loan. Ex. 12. Nu-Med, a public company, filed a 10-K report with the SEC with information through the fiscal year ending April 30, 1992. The 10-K report stated that NU-Med was having trouble meeting its obligations and anticipated difficulties in meeting its debt payments through the next fiscal year. The Bank's failure to review and consider that information[11] when the loan was renewed in August is an unsafe and unsound practice likely to cause substantial dissipation of Bank assets and earnings and weaken the Bank's condition. Ekstrom Decl. ¶ 29.

Garner's participation in the approval of the loan renewal presented a conflict of interest since the accounts receivable of his related interest, Coast, secured the loan. The conflict of interest significantly contibuted [sic] to an abnormal risk of loss or damage to the Bank, is likely to cause substantial dissipation of assets or earnings and weaken the Bank's condition.

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advantage and strengthening of the asset, its classification as loss is deferred until its more exact status may be determined.

[11] The 10-K was not in the Bank's loan files at the time of the September, 1992 examination.

b. Garner's Excessive Compensation is Unsafe and Unsound and Unsound [sic] and is Likely to Cause Substantial Dissipation of Earnings and Weaken the Bank's Condition.

In 1991 Garner was paid a salary of $201,000, and received a $100,000 bonus. In 1992, Garner's salary was $300,000, which together with his additional director fee compensation, is *almost double* the average total cash compensation paid to chief executive officers in California banks of similar size. Ekstrom Decl. ¶ 32.

Safe and sound banking practices, as well as the OCC's Banking Circular 115, require that compensation have a direct relationship to the type, level, and quality of services provided to the bank, and must be documented. While the Bank provided the FDIC with a single page document entitled "Compensation Report," the report contains no factual support that the salary was warranted, and does not comply with the requirements of Banking Circular 115.

An unjustified salary that is double the average for officers in banks of similar size is excessive. Paying an excessive salary, especially when it is undocumented and unjustified, is an unsafe and unsound practice that is likely to dissipate earnings and weaken the Bank's condition.

c. The Bank's Purchase of Key-Person Insurance is Unsafe and Unsound and Unsound [sic] and is Likely to Cause Substantial Dissipation of Earnings and Weaken the Bank's Condition

National banks may obtain life insurance to protect themselves against the loss of "key-persons" in bank management or directorate, whose deaths would be of such consequence to the bank as to give it an insurable interest in the key persons life. 12 C.F.R. § 7.7115 and Banking Circular 249. National banks may not purchase life insurance on an individual who is not demonstrably a key-person, or in an amount that is not reasonably related to the bank's potential loss.

Bank policy states that EVERY DIRECTOR and EVERY EXECUTIVE OFFICER with more than five years tenure at the Bank will be covered by key-person insurance. The Bank does not provide key person insurance on the basis of demonstrated consequence to the Bank should the insured die, but instead only on tenure at the Bank. As a result of its policy, the Bank has key-person insurance for all board members except the Bank president because he has not been at the bank for five years. Ex. 2-A, 13-14.

The purchase of life insurance policies by the Bank where no insurable interest exists is an unsafe and unsound practice that has caused, and is likely to continue to cause dissipation of bank earnings, and is likely to weaken the Bank's condition.

d. Fees Paid to Harvey Garner are Unsafe and Unsound and are Likely to Cause Substantial Dissipation of Earnings and Weaken the Bank's Condition

Harvey Garner, brother of Garner, owns Fam Four, Inc. a company that performs inspections for the Bank in connection with real estate construction loans. The bills submitted by Harvey are reviewed by Daniel, the Bank's Chief Administrative Officer and another of Harvey's brothers. Daniel authorizes the payment of the bills submitted by his brother Harvey. There is no analysis of the level or quality of services provided by Harvey or of the reasonableness of the fees paid by the Bank. Safe and sound banking practices require that all fees paid by a bank have a direct relationship to the type, level and quality of services provided. This is particularly important when fees are paid to close relatives of bank managers. The Bank's practice of giving a single person with a potential conflict of interest the authority to pay the invoices is also unsafe and unsound. The unsafe and unsound practices evidenced by the fees to Harvey Garner are likely to result in the dissipation of earnings and weaken the condition of the Bank. Ex. 2-A, 13.

3. The Non-Compliance With The Formal Agreement Is An Unsafe And Unsound Practice That Is Likely To Cause Substantial Dissipation Of Assets And Earnings And Weaken The Bank's Condition

On March 21, 1989, in response to agency concerns regarding the Bank's condition, the Bank, through its board of directors, entered into a Formal Agreement with the OCC. A Formal Agreement is one of the many enforcement tools the OCC uses to carry out its supervisory responsibilities. The OCC uses enforcement actions such as a Formal Agreement to secure and memorialize in writing management and board commitments to effect specific remedial measures to address safety and soundness concerns.

The March 21, 1989 Formal Agreement ("the Agreement") generally requires the Board to take actions to address weaknesses in the Bank. The weaknesses addressed relate to basic banking matters. The Agreement requires actions by the Bank's Compliance Committee, the adoption of systems and controls on insider lending, steps to improve asset quality and the reduction of large volumes of loans to out-of-area borrowers, the reduction of real estate construction loans, and substantial improvements in loan administration. Ex. 6.

As of the September, 1992 examination, the Bank had not yet achieved compliance with the document. While the Bank is in partial compliance with some of the articles of the Agreement, there is no demonstrated effort to achieve full compliance with the Agreement. As a result, after *four years,* the Bank has many of the same problems and weaknesses the Agreement directed the Bank to correct. Ex. 2-A, 6-11.

Failure to comply with a Formal Agreement, particularly after such an extended period of time within which to achieve compliance, is an unsafe and unsound practice that has dissipated, and is likely to continue to substantially dissipate assets and earnings and weaken the condition of the Bank.

4. The Unsafe And Unsound Practices In Loan Administration Are Likely To Cause Substantial Dissipation Of Assets And Earnings And Weaken The Bank's Condition.

Prudent loan administration encompasses loan policy development and implementation, loan approval, credit information, collateral documentation, loan review and monitoring, loan collection practices and management information systems. Because most of a bank's assets are loans, it is essential that banks have a sound loan administration. As of the September, 1992 examination, $114 million of the Bank's $140 million of assets were loans.[12] Ekstrom Decl. ¶ 42.

a. Failure to Obtain and Analyze Current Credit Information is an Unsafe and Unsound Practice Which is Likely to Cause Substantial Dissipation of Assets and Earnings and Weaken the Bank's Condition.

Safe and sound banking requires that the ability of a borrower to repay a loan be determined before the loan is approved. In order to evaluate the prospective borrower's ability to repay, current financial information, including cash flow, should be analyzed. The Bank's loan officer memoranda are intended to document the Bank's analysis of a borrower's ability to repay.

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[12] Only 17% of the Bank's loans were made within its delineated community, most of which were made to Bank insiders and their related interests.

At the September, 1992 examination, as at previous examinations, the loan officer memoranda were found to have serious flaws. In a significant percentage of loan officer memoranda reviewed during the September, 1992 examination, there was little or no analysis of the financial information provided by the borrowers. Instead, the loan officer memoranda generally only restated information from borrowers' financial statements. The loan officer memoranda failed to disclose obvious inaccuracies in borrowers' financial statements; failed to analyze borrowers, income tax returns and other income information to determine accurately income and cash flow. Ekstrom Decl. ¶ 49. The Bank failed to obtain explanations for significant balance sheet items on 24 credits with a value of $16 million (representing 14% of total loans); and failed to perform adequate cash flow analysis on 35 credits with a value of $29 million, representing 25% of total loans. Ex. 18. In addition, many of the cash flow analyses reviewed did not support the borrowers' repayment capacity. In addition, 43 credits, with a value of $30 million (26% of total loans), did not have an identified source of repayment at all. *Id.* Failing to analyze correctly a borrower's capacity to repay a loan exposes the Bank to unnecessary risk of loss, and is an unsafe and unsound practice that is likely to cause substantial dissipation of assets and earnings and weaken the Bank's condition.

The September, 1992 examination also revealed that lending decisions were made on the basis of incomplete or stale financial information about borrowers. The September, 1992 ROE noted that approximately 38 loans, representing $28.2 million (50% of dollar volume sampled and nearly 25% of the portfolio's total dollar volume) had incomplete, incorrect, or stale financial information or stale tax returns. Ex. 2-A, 9. Relying on incomplete and/or stale financial information about borrowers exposes the Bank to unnecessary risk of lose, and is an unsafe and unsound practice that is likely to cause substantial dissipation of assets and earnings and weaken the Bank's condition.

b. Failure to Ascertain the Value of Collateral is an Unsafe and Unsound Practice Which is Likely to Cause Substantial Dissipation of Assets and Earnings and Weaken the Bank's Condition

Safe and sound banking requires that a bank know the value of the collateral pledged against a loan. Only with adequate and current appraisals can a bank properly identify the risks associated with the *loans* and determine whether additional actions should be taken to protect the bank's interests. At the September, 1992 examination, 15 loans with a value of $14 million did not have current and accurate appraisals on the supporting collateral. Ekstrom Decl. ¶ 22. The Bank's failure to obtain current and accurate appraisals exposes the Bank to unnecessary risk of loss on the loans, is an unsafe and unsound practice that is likely to substantially dissipate Bank earnings and weaken the Bank's condition.

Because of the risks associated with real estate related loans, and in order to protect federal financial and public policy interests in real estate, national banks are generally required to obtain written appraisals that meet specific criteria in connection with real estate related loans. 12 C.F.R. Part 34. An appraisal provides a bank with an independent valuation of the real estate that secures a loan.

While the Bank developed and implemented an appraisal review program after the 1991 examination, it has not proven to be effective. At the September, 1992 examination appraisals for 14 loans did not meet the criteria of 12 C.F.R. Part 34. Ekstrom Decl. ¶ 58. The failure to obtain appraisals that conform to the regulations is a violation of regulation, exposes the Bank to unnecessary risk of loss, and is an unsafe and unsound practice that is likely to cause substantial dissipation of assets and earnings and weaken the Bank's condition.

c. The Bank's Loan Approval Process Exposes the Bank to Undue Risk of Loss, and is an Unsafe and Unsound Practice Which is Likely to Cause Substantial Dissipation of Assets and Earnings and Weaken the Bank's Condition

The Bank's policy requires that all loans be approved by the Directors' Loan Committee. Ekstrom Decl. ¶ 44. Bank policy requires that the Loan Committee review memoranda prepared by loan officers for every loan it approves. The memoranda, in theory, provide the Loan Committee with sufficient information upon which to make sound lending decisions. *Id.* However, the September, 1992 examination found, again, that the loan officer memoranda reviewed by the Loan Committee fail to address credit risks in sufficient detail. In particular, the memoranda do not provide an adequate analysis of the borrowers' repayment capacity, cash flow, or collateral values. Ex. 2-A, 9. Without such basic information as what the expected source of repayment of a loan will be, or how much the collateral pledged against the loan is worth, the Loan Committee can not make informed lending decisions. By authorizing loans without first obtaining and analyzing such basic information, the Loan Committee exposes the Bank to abnormal risk of loss or damage. This is an unsafe and unsound practice that is likely to cause substantial dissipation of assets and earnings and weaken the Bank's condition.

d. The Bank's Loan Review and Problem Loan Identification Exposes the Bank to Undue Risk of Loss, and is an Unsafe and Unsound Practice Which is Likely to Cause Substantial Dissipation of Assets and Earnings and Weaken the Bank's Condition

Once a bank makes a loan, and as long as the loan is on its books, safe and sound practices require a bank to review the loan to determine whether the loan has become a problem credit or has the potential to become a problem credit. In other words, the Bank should determine whether anything has happened to the borrower or collateral that increases the risk of loss to the bank. Loans that are identified as problem loans must be closely monitored to protect the bank's interest.

After the 1991, examination, the Bank formalized a two-stage internal loan review function to identify problem credits. The first stage consisted of a review of loan documentation. This stage was not effective. As noted above, the September, 1992 examination found numerous and significant instances where the Bank did not have sufficient documentation upon which to make the initial lending decision, let alone subsequent problem loan identifications. The second stage of the review, credit quality reviews had not been implemented at the time of the September, 1992 examination. At the September, 1992 examination, the OCC identified 19 problem loans totalling $13 million that the Bank had not identified as problems. Ekstrom Decl. ¶ 70. Failure to identify problem loans exposes the Bank to abnormal risk of loss or damage. This is an unsafe and unsound practice that is likely to cause substantial dissipation of assets and earnings and weaken the Bank's condition.

As part of its ongoing review of its loan portfolio, a bank should identify those loans which are classified or criticized.[13] Proper loan classification is essential to determining the level of risk in the loan portfolio. If a bank is not aware of the degree of risk and likely loss in its loan portfolio, the bank cannot take timely action to protect its interests, and increases its risk of loss on the loans.

During the September, 1992 examination, the OCC reviewed 101 loan relationships and downgraded[14] 28, or nearly one third, of those loan relationships.[15] Ekstrom Decl. ¶ 69. Eight of the loans totalling $5 million that were downgraded at the September, 1992 examination had been identified as problem loans by the OCC during the September, 1991 examination, and had been subsequently, and improperly, upgraded by the Bank. Ekstrom Decl. ¶ 71. The total criticized and classified assets at the September, 1992 examination is approximately $32 million, or *almost double* the $17 million of problem assets identified by the Bank. Ex. 2-A, 39. The Bank's failure to properly classify and criticize loans is an unsafe and unsound practice that exposes the Bank to unnecessary risk of loss and will likely cause substantial dissipation of assets, earnings and weaken the condition of the Bank.

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[13] Classified loans are those loans that are in need of strengthening and careful management if they are to be collected. They are assigned a quality rating based on the degree of risk and likely of loss if the deficiencies are not corrected. They are categorized into three categories based on the level of risk that exists: Substandard, Doubtful, Loss. Criticized loans are potentially weak.

[14] In this context, "downgraded" means the OCC assigned a more severe classification to the loan than the Bank did. For example, the Bank classified a loan as "Substandard", but the loan evidenced weaknesses that made collection in full highly

5. The Failure To Maintain An Adequate Allowance For Loan And Lease Losses Is An Unsafe And Unsound Practice That Is Likely To Cause Substantial Dissipation Of Earnings And Weaken The Bank's Condition.

National banks must maintain an Allowance for Loan and Lease Losses ("ALLL") that is adequate to absorb all estimated inherent losses in the bank's loan and lease portfolio. Banking Circular 201 (Rev. 2/20/92) states that the failure to maintain the ALLL at an adequate level is an unsafe and unsound banking practice.

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questionable, and the OCC "downgraded" the loan to "Doubtful".

[15] Management did not disagree with the downgrades of 17 of the 28 loan relationships.

At the September, 1992 examination, as at the previous examination, the Bank's methodology of determining an adequate ALLL level was criticized. The Bank's methodology did not comport to the requirements of Banking Circular 201[16], but instead applied arbitrary and unsubstantiated percentage allocations against loans. Ex. 2-A, 20.

As a result of the unacceptable methodology, and the previously discussed improper loan classifications, the Bank's ALLL was significantly understated. Bank management was told when the examiners left the Bank that the ALLL balance was short approximately $500,000. *Id.* After the examiners left the Bank, but before the Report of Examination was completed and delivered to the Bank, the credit risks of two loans (Nu-Med, Inc. and College of Osteopathic Medicine of the Pacific) were changed. The changes in credit risk, or the increase of inherent loss in the two loans, required an additional provision to the ALLL of at least $625,000. In total then, the Bank's ALLL was short by more than $1 million. Ekstrom Decl. ¶ 76. An increase in ALLL is generally made through a charge to earnings.

The Bank's failure to maintain an adequate ALLL is an unsafe and unsound practice that results in overstated capital and earnings. By restoring the ALLL to an adequate level, there is a significant dissipation of earnings and weakening of the Bank's condition.

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[16] For example, the Bank's ALLL methodology does not reflect historical loss experience for problem loans or translate risk into dollar allocations.

6. The Bank's Failure To Have Adequate Liquidity Is An Unsafe And Unsound Practice That Will Likely Cause Substantial Dissipation Of Earnings And Weaken The Bank's Condition.

Liquidity represents the ability of a bank to meet its financial obligations. To have adequate liquidity, a bank must have reasonably priced funds available, or the ability to convert assets to cash quickly without high losses. An adequate liquidity level permits a bank to meet its expected, and some unexpected cash needs. In order to control liquidity risk which occur due to maturity mismatches between liabilities, banks must increase or decrease assets or liabilities. The Bank has not done this.

The Bank's assets and liabilities are significantly mismatched. The Bank's deposits (liabilities) are highly volatile. As of the September, 1992 examination, 66% of the Bank's total deposits, or $84 million, were short term deposits (having maturities ranging from one month to one year) in amounts greater than $90,000 and were largely from outside the Anaheim area.[17] Ekstrom Decl. ¶ 81. These deposits are considered volatile because it is likely the depositors will withdraw their funds if they can obtain a higher interest rate anywhere else. By law, the Bank is prohibited from paying an effective interest yield that exceeds the national rate by more than 75 basis points (or three-quarters of one percent).[18] Since the Bank has proven its inability to generate a stable deposit base in its community, and it is prohibited from obtaining brokered deposits, its ability to replace maturing volatile deposits is highly doubtful.

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[17] Only 11% of deposits are from the Bank's delineated community.

[18] On February 3, 1993 the FDIC denied the Bank's request for a waiver that would have permitted the Bank to pay interest rates in excess of 75 basis points above the national rate. Ekstrom Decl. ¶ 83.

Due to limited sources of available funds, the Bank will have to liquidate loans to fund the withdrawal of its highly volatile liabilities.[19] The Bank's loan portfolio is concentrated in loans secured by real estate[20] (a significant portion of which are classified) that generally cannot be easily sold at face value. Thus, the Bank has placed itself in the position where it may be unable to fund all of its commitments without selling assets at a loss that will dissipate earnings. The Bank's dependence on high rate, short term, out of area deposits is an unsafe and unsound practice that is likely to result in substantial dissipation of earnings and weaken the Bank's condition.

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[19] Loans outstanding as of the September, 1992 examination amounted to almost 90% of deposits. Ekstrom Decl. ¶ 84; *See* Ex. 19.

[20] Approximately 75% of the Bank's loans are secured by real estate.

7. Management And The Board Engage In Unsafe And Unsound Practices That Are Likely To Cause Substantial Dissipation Of Assets And Earnings And Weaken The Bank's Condition.

a. Management and the Board Have Not Acted to Achieve Compliance With the Formal Agreement.

Management and the Board have not acted to ensure the Bank achieve compliance with the March 21, 1989 Formal Agreement. As a result, at no time in the past four years has the Bank been in compliance with the Formal Agreement. The lack of compliance with the Formal Agreement will likely cause substantial dissipation of assets and earnings and weaken the Bank's condition.

b. Management and the Board Have Not Acted to Address the Weaknesses and Deficiencies Noted in Reports of Examination.

Weaknesses and deficiencies in the Bank have been brought to the attention of the Board and Management in every OCC Report of Examination. However, the board has not adequately addressed the weaknesses, and the OCC has had to repeat the criticisms in subsequent examinations, to no avail. At the September, 1992 examination there were repeat criticisms of, among other things: 1) insider transactions; 2) supervision by board and management of the loan portfolio: 3) asset quality; 4) risk identification systems; 5) the adequacy of the ALLL; 6) quality of earnings; 6) information systems; 7) inadequate policies, systems and controls; 8) liquidity; 9) board and management supervision; 10) loan administration; 11) internal loan review; and 12) Garner's excessive participation in the day to day activities of the Bank. *See, generally,* Ex. 2-A; Ex. 2-B.

Failing to address previously identified weaknesses is an unsafe and unsound practice that is likely to cause significant dissipation of assets and earnings and weaken the condition of the Bank.

c. Board and Management Acceptance of Poor Internal Reports is an Unsafe and Unsound Practice That is Likely to Cause the Substantial Dissipation of Assets and And Earnings and Weaken the Bank's Condition.

Inaccurate and poor internal reports and systems result in the management and the board not being able to make informed, sound decisions on lending matters. Loan officers prepare, and the Directors Loan Committee accepts memoranda that do not analyze the capacity of borrowers to repay loans. Ekstrom Decl. ¶ 52. Management presents and the Directors Loan Committee approves loans that do not have sufficient collateral information, including required appraisals. The board and management have failed to implement an effective loan review program. Ekstrom Decl. ¶¶ 85-92. Board and management have failed to implement procedures that ensure the Bank's ALLL is adequate. Ekstrom Decl. ¶ 74. These practices expose the Bank to abnormal risk of loss. They are unsafe and unsound practices that are likely to cause substantial dissipation of assets and earnings and weaken the Bank's condition.

In addition, management has disregarded advice from an external loan review without documenting the reasons for doing so. Paul B. Hogan & Associates completed a review in June, 1992. Management, without explanation, did not agree with Mr. Hogan's classifications on a number of loans, and did not change their internal grades as recommended by Mr. Hogan. Ex. 2-A, 16. Not following the recommendations of an external loan review without explanation is an unsafe and unsound practice that is likely to cause substantial dissipation of assets and earnings and weaken the Bank's condition.

d. It is an Unsafe and Unsound Practice to Withhold From the President the Authority and Responsibility Necessary to Perform His Duties.

The Bank is under the direct leadership of Garner, who as chief executive officer and chairman of the board, exercises dominant control over the Bank. The Bank's president's role is limited. For example, the president does not participate when the board goes into Executive Session. Ex. 2-A, 12. When in Executive Session, the board does not have a single member with Bank operational expertise and experience. Not giving the president the authority and responsibility necessary to perform his duties is an unsafe and unsound practice that is likely to weaken the condition of the Bank.

D. THE BANK IS IN AN UNSAFE AND UNSOUND CONDITION TO TRANSACT BUSINESS.

1. The Condition Of The Bank's Loan Portfolio Is Critical And Is Expected To Deteriorate.

Classified loans relative to capital have increased over the last three examinations from 51% to 131% to 240% of capital. Ekstrom Decl. ¶ 93. As of the September, 1992 examination, the dollar volume of classified loans, those in need of strengthening and particularly careful management, was almost two and one half times the dollar amount of the Bank's capital. During the September, 1992 examination, examiners reviewed 101 loans, with a total dollar value of $62 million. The OCC review encompassed 54 percent of the dollar amount of all loans outstanding. Examiners classified $29.5 million of loans and OREO[21]. Of these assets, $27.8 million were classified as substandard, $1.3 million as doubtful, and $200,000 as loss. In addition, the OCC criticized $3.0 million as other assets especially mentioned. Ex. 2-A, 39.

Unless a bank takes specific actions to improve the quality of its criticized loans, the loans often deteriorate. For example, substandard loans become doubtful or loss, and doubtful loans become loss. As discussed *supra* at 19-25, the Bank does not have systems in place to ensure borrowers have the ability to repay loans when they are made or recognize the weaknesses in its loan portfolio, let alone strengthen the portfolio. Thus, it is expected that the quality of the portfolio will deteriorate. Almost $28 million of assets are criticized as substandard. While the dollar amount that will result in loss cannot be stated, it is more than likely that the deterioration in the loan portfolio will result in the Bank's becoming a critically undercapitalized institution, and the OCC would be expected to place the Bank into receivership. 12 U.S.C. §§ 1821(c)(5)(L) and 1831o(h)(a).

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[21] OREO (Other Real Estate Owned) generally is property owned by the Bank as a result of foreclosure.

Nonperforming assets, which include nonaccrual loans (loans where payment in full is in doubt) and OREO, rose from 1 percent of total assets as of December 31, 1990 to 4 percent as of December 31, 1991 and 11 percent as of December 31, 1992. As of December 31, 1992 11 percent of the Bank's assets did not generate income for the Bank. Ekstrom Decl. ¶ 93. This volume of nonperforming assets is significantly higher than that for banks of similar size and operation. The Bank reported that as of December 31, 1992, its nonaccrual loans were 8.23% of total loans, compared with 0.92% of total loans for banks of similar size and operation. Only one or two of the 300 banks of similar size and operation have as high a percentage of nonaccrual loans. Ekstrom Decl. ¶ 94. As the Bank's loan portfolio continues to deteriorate, more loans will likely become nonperforming.

The condition of the loan portfolio is unsafe and unsound. The level and trend of criticized, classified and nonperforming loans threaten the Bank's viability. The condition of the loan portfolio is key to the Bank's overall condition since the vast majority of the Bank's assets are loans. Because the quality of the Bank's loan portfolio is critical, the Bank is in an unsafe and unsound condition to transact business.

2. The Bank's Earnings Are Weak And Threaten The Bank's Viability.

The Bank's profitability has declined since 1989. Net income, as reported by the Bank, was $1.0 million in 1992[22], compared to $1.4 million in 1989. The Bank's return on assets fell to 0.73% in 1992, compared to 1.63% in 1989. Ex. 19. The Bank's 1992 return on assets ratio was in the twenty-eighth percentile of banks of similar size and operation. Ex. 19. The Bank reported a loss of $83,000 for the first three months of 1993. Ex. 28.

The Bank's earnings are necessarily affected by the unsafe and unsound practices and condition of the Bank. For example, as the quality of the loan portfolio deteriorates, the Bank must make provisions to its ALLL to absorb the inherent losses in the loan portfolio. As a result of the September, 1992 examination, the Bank was required to make a total provision of more than $1 million. That provision eliminated the Bank's net income through September 30, 1992. Ekstrom Decl. ¶ 98.

In a like manner, the Bank's earnings are affected by the critical level of nonperforming assets. Banks generally earn income from the interest on loans. With more than $15 million in nonperforming assets, approximately 11% of the Bank's assets do not generate income. It is expected that the level of nonperforming assets will increase, thereby further reducing the Bank's potential income stream. Ekstrom Decl. ¶ 99.

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[22] This net income figure does not reflect the total provision necessary to restore the ALLL to an adequate level. Since the ALLL was restored to adequate levels through a charge to earnings, the Bank's actual earnings are less than the $1 million reported.

The Bank's practice of paying high interest rates on deposits also affects earnings. Banks make money on the difference between the amount they charge on loans and the amount they pay on deposits. Because the Bank pays a high interest rate on deposits, its ability to generate earnings is limited.

Because the Bank's earnings and prospect of earnings are so weak, the Bank is in an unsafe and unsound condition to transact business.

3. The Bank's Capital Is Not Adequate.

The Bank's capital, with risk-based and leverage ratios at 8.5% and 7.8% respectively, is not adequate to cover the substantial risk that exists in the Bank. Ekstrom Decl. ¶ 102. The Bank's capital needs to be increased due to the: (1) high risk of capital impairment due to loss; (2) high interest rate risk and inadequate asset/liability management; (3) high operational risk and inadequate operations management; (4) high credit concentration risk and inadequate credit concentration management; (5) poor liquidity levels and inadequate liquidity management; and (6) high volume of problem and criticized loans and inadequate loan portfolio management. Ekstrom Decl. ¶ 103.

It is not sufficient for the Bank to merely increase capital. The Bank must at the same time address the underlying weaknesses that threaten capital. For example, and as indicated above, it is expected that the quality of the Bank's loan portfolio will decline and the Bank will be required to make additional significant provisions to the ALLL. Without sufficient earnings, the Bank will have to use capital to fund the ALLL.

There are no identified sources of increasing the Bank's capital. Earnings which are often used to bolster capital are insufficient and cannot be viewed as a source of capital.

Without sufficient capital, a bank is in an unsafe an [sic] unsound condition to transact business.

4. Bank Management And Directorate

The Bank is under the direction and control of individuals who have abused and continue to abuse the Bank for their own purposes. No one other than those who have abused the Bank has the knowledge or ability to assume direction and control of the Bank.

As stated *supra* at 8, the high level of illegal and abusive insider activities and the unsafe and unsound practices by management and the directorate have resulted in Notices of Intention to Prohibit Further Participation being issued against the Bank's President, Senior Vice President, Chief Financial Officer, Senior Lending Officer, Senior Credit Administrator, and every director. Each of these individuals is charged with actions so egregious that it is necessary to prohibit each not only from participating in the affairs of the Bank, but also from participating in the affairs of any financial institution with Federal deposit insurance.

Given the extensive level of incomplete and fraudulent Bank records, even if capable management were brought into the Bank, new management would not be able to rectify the Bank's underlying problems and weaknesses. Only those individuals who have abused the Bank know the Bank's true condition.

Since the Bank is under the complete direction and control of individuals who have abused, and continue to abuse the Bank, and since there is no one with the experience, ability and integrity who is familiar with the Bank who could assume control of the Bank, the Bank is in an unsafe and unsound condition to transact business.

E. THE BANK HAS AND CONTINUES TO CONCEAL PAPERS AND RECORDS OF THE BANK, AND HAS REFUSED AND CONTINUES TO REFUSE TO SUBMIT PAPERS, BOOKS, AND AFFAIRS OF THE BANK FOR INSPECTION BY THE OCC

12 U.S.C. § 191 was amended by the Congress, effective December 19, 1992, to authorize the OCC to appoint a receiver for any national bank, when, among other reasons, the bank conceals, or refuses to submit books, papers, records, or affairs of the bank. Webster's New Collegiate Dictionary defines "conceal" as "to prevent disclosure or recognition of," or "to place out of sight." Black's Law Dictionary defines "concealment" as "a withholding of something which one knows and which one, in duty, is bound to reveal."

Congress has long recognized the seriousness of a national bank's refusal to provide information to the

OCC. Specifically, Congress amended 12 U.S.C. § 481 on June 16, 1933 by adding the following proviso:

> That in making the examination of any national bank the examiners shall include such an examination of the affairs of all its affiliates other than member banks as shall be necessary to disclose fully the relations between such bank and such affiliates . . . *and in the event of the refusal to give any information required in the course of the examination of any such affiliate,* or in the event of the refusal to permit such examination, all the rights, privileges, and franchises of the bank shall be subject to forfeitures. . . .

12 U.S.C. § 481, ch. 89, § 28(a), 48 Stat. 192 (emphasis added).

Thus, Congress has authorized the OCC, since 1933, to use the remedy of forfeiture of a national bank's charter, virtually identical to the remedy of appointment of a receiver, for refusal to provide information. In addition, as discussed *infra* at 105-107, the OCC's authority under 12 U.S.C. § 191 to appoint a receiver in cases where a national bank conceals or refused to provide information to examiners is retroactive.

1. Garner Submitted False Confidential Biographical And Financial Reports To The OCC in 1983 and 1984

The history of concealment of information from the OCC began in 1983, even before the Bank was chartered. At that time, Garner sought approval from the OCC to be an organizer and director of the proposed Bank. A year later, Garner sought OCC approval to hold the office of

Bank president. In both instances, Garner concealed information regarding his integrity that would have weighed heavily against his being approved.

In order to determine whether an individual is qualified to act as a director or executive officer of a national bank, the OCC requires that the individual complete an OCC Confidential Biographical and Financial Report. This report allows the OCC to determine whether an individual has the experience, ability and integrity to hold a senior management position in a particular national bank.

In connection with his application to the OCC for approval to be an organizer and director of the proposed Bank, Garner submitted a Confidential Biographical and Financial Report dated June 30, 1983. Ex. 249. That report contained the following request on page 6, under Part A, section 4, (d):

> Provide the following information regarding each disciplinary proceeding or action of which you are, or have been, the subject, with respect to any professional license you hold or have held. Examples: Disbarment, censure of conduct, revocation of license, etc.

Garner's answer was as follows:

> NONE – except for nominal fee disputes inquiries and a 1975 question of whether or not there was a violation of compact [sic] law, all of which have resulted in no action.

Garner failed to state that he was and had been the subject of an ongoing disciplinary proceeding by the New York State Bar ("Bar") since April, 1981. Ex. 251, 3. The

Bar charged Garner with serious professional misconduct relating to an infant adoption which took place in California. Plainly, Garner was and had been the "subject of" a "disciplinary proceeding." Garner's response made no reference to the "Nature of Proceedings" in which he was involved. In addition, Garner's statement that "all of which have resulted in no action," was clearly false, as there had been a great deal of "action" in Garner's ongoing disciplinary proceeding. *Id.* at 8. Garner was subsequently suspended from the practice of law for one year in October, 1984. *Matter of Garner,* 103 A.D.2d, 390 (N.Y. App. Div. 1984).

Less than a month before he was suspended from practicing law, Garner submitted another report to the OCC for approval to become the Bank's president, dated September 24, 1984. Ex. 250. Garner's response to the same request on page 6, item "d" of Ex. 249 quoted above was simply "NONE." Garner's response again was false for the same reasons stated above.

After learning of Garner's false statements on the Confidential Biographical and Financial Reports, the Bar initiated a disbarment action against Garner and subsequently disbarred him from the New York Bar on February 10, 1992. Ex. 239. The referee hearing the case ("Referee") wrote in his report that Garner's responses on the OCC reports were "so lacking in candor . . . and unenlightening as to amount to misleading and [were] grossly inaccurate." Ex. 251 at 8.

In his defense, Garner asserted that he was not required to disclose the 1981 disciplinary proceeding pursuant to New York Judiciary Law section 90 subd. 10. *Id.*

at 9. The Referee determined that Garner's defense was baseless, and stated that Judiciary Law section 90 subd. 10, "does not grant an attorney a license to mislead, falsify and lie." *Id.* at 9.

As further justification for the false and misleading statements he submitted, Garner asserted that he did so on the advice of his deceased counsel. *Id.* at 10. The Referee stated in his report that such "peculiar advice" from a lawyer who is no longer alive should be looked upon dubiously. *Id.*

2. Daniel Garner's Position As An Executive Officer Was Concealed From Examiners

Daniel started working with the Bank as an executive officer in May, 1984. Scherf Decl. ¶¶ 42-45. Daniel's executive officer status, however, was concealed from the OCC until March, 1988. *Id.* Had Daniel's true position as an executive officer been disclosed, he would have been required to submit a Confidential Biographical and Financial Report, and would have been subject to among other things, the lending restrictions applicable to executive officers as set forth in 12 U.S.C. §§ 375a, 375b, and 12 C.F.R. Parts 31 and 215. Although the Bank concealed Daniel's status as an executive officer until nearly four years after he started, an extensive review of the Bank records during the 1992 Investigation clearly demonstrates that he was in fact an executive officer from the time he started, and that Bank directors willfully concealed that fact by doctoring minutes and misleading the OCC.

An executive officer is defined in 12 C.F.R. § 215.2(d) (footnote omitted) (emphasis added) as:

> [A] person who participates or has authority to participate (other than in the capacity of a director) in major policymaking functions of the company or bank, whether or not: (1) The officer has an official title, (2) the title designates the officer an assistant, or (3) the officer is serving without salary or other compensation. The chairman of the board, the president, ***every vice president,*** the cashier, the secretary, and the treasurer of a company or bank are considered executive officers, unless (i) the officer is excluded, by resolution of the board of directors or by the bylaws of the bank or company, from participation (other than in the capacity of a director) in major policymaking functions of the bank or company, and (ii) the officer does not actually participate therein. . . .

Daniel's various titles from 1984 to 1988 included "Senior Vice President," "Senior Vice President/Business Development," and "SVP/Administrator." Scherf Decl. ¶ 44.

Daniel was an executive officer in both title and deed. A review of Bank records during the 1992 Investigation revealed that Daniel was intimately involved in the daily affairs of the Bank, and clearly demonstrates the Bank's claim that Daniel was not an executive officer to be false. Scherf Decl. ¶ 43.

Daniel regularly attended board and committee meetings and actively participated in the management of the Bank. Holmes Aff. ¶ 9; Dr. Daniel Aff. ¶ 25. Board minutes failed to reflect that Daniel was present at *many* of the meetings when he did in fact attend them. *Id.* In July, 1984, the board passed a resolution stating that Daniel was authorized to sign official Bank checks and to execute other instruments as may be deemed necessary in the daily business of the Bank. Scherf Decl. ¶ 43. Organizational charts of the Bank's *management* showed Daniel as one of only three senior level bank officials who answered directly to the chairman. *Id.* In addition to being the Bank's personnel officer, Daniel was appointed by the board to head up the Bank's business development department. As of 1985, he also received the second highest salary in the Bank after his brother, Garner. Daniel was also covered by "key-person" insurance. *Id.*

The Board of Governors of the Federal Reserve Board ("Fed") has ruled that persons authorized to execute documents or instruments on behalf of a bank (i.e.: deeds, checks, drafts and other documents), are presumed to be considered as executive officers of the bank. 1 Fed. Res. Reg. Service 3-1042 (June 1981). As a result, Daniel's authority to sign official Bank checks and execute other instruments in and of itself makes him an executive officer of the Bank.

In addition to his other duties, Daniel chaired the weekly loan officer delinquency meetings, where loan officers reported to him on their collection efforts. Holmes Aff. ¶ 19. All employees of the Bank, including senior officers, took instructions from, and reported to, Daniel. Holmes Aff. ¶¶ 10, 11, 12, 19; Dr. Daniel Aff. ¶ 25. It was clear that Daniel, together with Garner, ran the day to day affairs of the Bank. Holmes Aff. ¶ 11; Dr. Daniel Aff. ¶ 24.

Although a number of Bank employees appeared on record to officially report to other officers of the Bank, they in fact reported to Daniel. As an example, Holmes "officially" reported to the Bank's senior lending officer, Kavanagh, and the Bank's senior credit administrator, Young. In fact, Holmes actually reported to Daniel, who had the authority to override Kavanagh's and Young's instructions. Holmes Aff. ¶ 10. Similarly, although the Bank's Cashier, Laura Mantoani "officially" reported to the Bank's Chief Financial Officer, Robert Duncan ("Duncan"), she actually reported to Daniel. *Id.* ¶ 36.

Daniel had an "invisible authority" at the Bank, as he would only instruct employees verbally. Holmes Aff. ¶¶ 11, 13. The Bank's loan officers functioned as "ghost writers" who prepared loan documents as verbally instructed by Daniel. *Id.* ¶ 13. The loan officers prepared the documents as if they had handled the loan themselves. *Id.*

It was clear to Bank employees that Daniel was an executive officer with the Bank, and that he attempted to conceal his position from parties outside the Bank. Bank employees referred to Daniel as "the invisible man." Holmes Aff. ¶ 12.

Although Daniel was clearly an executive officer, the Bank refused to disclose that he was executive officer and, consequently, would not provide the OCC with a Confidential Biographical and Financial Report on him as requested. In an August 29, 1984 letter from Garner to Rufus O. Burns, District Administrator, Western District ("Burns"), Garner stated that Daniel was a "Business Development/Marketing Officer." Garner stated that his brother was not part of the management team and, thus, did not need to file a Financial and Biographical Report. Garner stated that his brother did not receive a salary, and was merely "accommodating" Garner's needs while the Bank searched for a Cashier. Ex. 80. Three months after Garner wrote the letter, the board approved Daniel's $50,000 annual salary plus an auto allowance. There is no indication that Daniel's responsibilities in the Bank changed at all as a result of his receiving the salary.

In depositions taken by the OCC in January, 1986, pursuant to an investigation into the Bank's ownership, a number of Bank directors stated under oath that Daniel was not an executive officer. Some of the directors stated that Daniel was not an officer at all. Ex. 252.

The Bank's attempt to conceal Daniel's authority in the management of the Bank was unsafe and unsound, and prohibited examiners from properly assessing the Bank management's ability. It is imperative that the OCC identify and assess a national bank's management team, as it is a key factor in the agency's assessment of a [sic] institution's condition. Management is one of the five elements that regulatory agencies examine to determine a bank's CAMEL rating. The management of a bank is vital in ensuring the health of the institution and is held to high standards, as evidenced by the restrictions Congress placed on management in 12 U.S.C. § 375a. When a bank conceals its management from the OCC, as the Bank did in this case, the OCC cannot properly assess the bank's management, and therefore cannot fully ascertain the bank's overall condition.

By concealing his executive officer status, Daniel avoided the scrutiny normally given to executive officers by the OCC. In so doing, Daniel received and guaranteed loans at the Bank in violation of 12 U.S.C. §§ 375a, 375b, 12 C.F.R. §§ 31 and 215.

3. The Bank Concealed Daniel's 1988 Bankruptcy

Daniel filed for personal bankruptcy on April 1, 1988. Ex. 132. This fact, however, came to the attention of examiners only after they were informed of the filing by sources outside the Bank. Duchscherer Decl. ¶ 27. Although Daniel had outstanding unsecured loans with the Bank at the time exceeding $200,000, and continued to receive unsecured Bank loans throughout 1988, no record of his bankruptcy filing was ever located in his credit file, or anywhere else in the Bank. *Id.* ¶ 28. As demonstrated below, a concerted effort was made by the Bank to conceal Daniel's bankruptcy from examiners. Garner, with the knowledge of other members of the board, even removed documentation of the bankruptcy from Daniel's credit file. *Id.* ¶ 32. Such concealment was unsafe and unsound as examiners were prevented from assessing the risk posed by Daniel's $200,000 of outstanding loans and, thus, prevented from assessing the Bank's true condition.

Although Daniel claimed in his April, 1988 bankruptcy filing to have total assets approximating only $9,000; total liabilities approximating $1.5 million; and monthly expenses exceeding his monthly income, he still received unsecured Bank loans (discussed *infra* at 52-59). *Id.* ¶ 44. At no time was the bankruptcy noted in his credit file, or was the matter addressed in Bank board or committee minutes. By concealing Daniel's true financial condition, Garner and Daniel caused the Bank to make loans to an insolvent borrower.

The Bank was one of Daniel's creditors, and received notice of Daniel's bankruptcy in mid April, 1988. *Id.* ¶ 28. As evidence of Garner's and Daniel's effort to conceal the bankruptcy from Bank records, Daniel provided the bankruptcy court with Garner's personal post office box as the Bank's address. Thus, bankruptcy court correspondence was not mailed to the Bank. These notices from the court have never been located. *Id.* In addition, although the Bank obtained a TRW credit report on Daniel in August, 1988, that report was not in Daniel's credit file and could not be located anywhere in the Bank by senior management or the examiners. Therefore, as part of the examination, examiners asked the Bank in March, 1989 to generate another credit report on Daniel. *Id.* ¶ 29.

Three days later, at an exit review meeting between Bank officials and examiners on March 23, 1989, Garner provided examiners with a reaffirmation agreement between Daniel and the Bank dated June, 1988.[23] Duchscherer Decl. ¶ 31; Bernal Decl. ¶ 6. Attached to the reaffirmation agreement was a June 28, 1988 memorandum from Garner to director Helsing in which Garner stated he had removed Daniel's TRW credit report and the attached reaffirmation agreement from Daniel's credit file. *Id.* In his memo to director Helsing, Garner instructed Helsing to inform the [Compliance] Committee of his actions. Garner told examiners that he had removed the TRW report and reaffirmation agreement from Daniel's credit file because the OCC illegally shared confidential information in the past with the "Grievance Committee."[24] Duchscherer Decl. ¶ 32; Bernal Decl. ¶ 8.

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[23] The reaffirmation agreement was never filed with the bankruptcy court as required and, therefore, was unenforceable by the Bank. *See* 11 U.S.C. § 524(c).

Garner's allegation that the OCC illegally shared confidential information was unfounded, self serving and false. Garner had no justification to remove Bank information from Bank files for the express purpose of concealing such information from the OCC. Garner rationalized that although he removed the documents from Daniel's credit file, the documents were never removed from the Bank. Duchscherer Decl. ¶ 32; Bernal Decl. ¶ 8. Such a statement makes a mockery of the examination process and is nonsensical, since the examiners had no access to the information. Such logic would conclude that no information can ever be "concealed" from examiners so long as it is "somewhere" in a bank.

By removing documentation from his brother's credit file, Garner willfully concealed Bank information from examiners, and prevented examiners from accurately assessing Daniel's financial condition, who, by his own admission, was insolvent at the time. The concealment of such fact by Garner and Daniel was an egregious breach of their fiduciary duty to the Bank, its shareholders and its depositors, and was clearly unsafe and unsound. By concealing the fact that Daniel was insolvent at the same time he was liable for over $200,000 to the Bank, Garner and Daniel put the Bank at risk by putting their own personal interests over those of the Bank's.

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[24] Although Garner did not explain what the "Grievance Committee" was, it was likely referring to the New York State Bar Grievance Committee. Duchscherer Decl. ¶ 32.

It was only after the Bank was required to generate an updated TRW credit report on Daniel, that Garner even addressed Daniel's bankruptcy with examiners. Even then, Garner produced only limited documentation, and placed all blame for the concealment on the OCC. Further, in his continuing attempt to conceal Daniel's bankruptcy from Bank records, Garner failed to disclose in the minutes of the March 23, 1988 meeting with examiners any of the discussion with examiners concerning Daniel's bankruptcy. *Id.* ¶ 33. This further demonstrates Garner's ability and willingness to draft minutes to reflect what he wants reflected, versus what actually occurred, and is consistent with sworn statements by former bank officials that Garner regularly falsified Bank records. *See* Dr. Daniel Aff. ¶¶ 21, 27; Holmes Aff. ¶¶ 3-6, 8, 9. This, and the fact that the chairman of the board removed Bank documents from his brother's credit file to conceal his brother's bankruptcy from examiners, further illustrates a pattern of deceit and concealment of information from examiners, and is indicative of what the OCC has had to deal with in its ongoing supervision of the Bank.

Daniel received several unsecured loans from the Bank after he filed for bankruptcy and before the bankruptcy was discharged. *Infra* at 52-60. Since Daniel's bankruptcy was not disclosed in his credit file, examiners could not properly evaluate the credit worthiness or propriety of these loans made to a borrower who was in bankruptcy. To date, Daniel's bankruptcy has not been recorded in Daniel's credit file.

4. The Bank Refused To Provide Daniel Garner's 1988 Financial Statement To Examiners

As set forth in the Duchecherer Declaration, ¶¶ 36-38, Daniel refused repeated requests by examiners in 1990 to provide a copy of his 1988 financial statement for review. Having learned from sources outside of the Bank that Daniel had concealed his April, 1988 personal bankruptcy filing from Bank records, examiners needed to ascertain what information Daniel had provided to the Bank to determine the extent, if any, of violations of law and unsafe and unsound activities. Daniel's failure to provide the financial statement, and the board's willingness to permit such action, further demonstrates a concerted effort by Bank insiders to conceal information from the OCC and mislead examiners.

In response to repeated requests by examiners for the financial statement, Daniel first stated in March, 1990, that he would provide the document, then stated in April, 1990, after another request, that the statement was with his accountant. Each time examiners requested the document, Daniel promised he would provide it, but never did. Daniel's refusal to cooperate with examiners and provide the document was inexcusable, unsafe and sound [sic], and violated 12 C.F.R. § 215.

In June, 1990, five months after examiners first asked for the financial statement, Garner told examiners that Daniel's home had been destroyed in a fire, destroying "everything he and his wife owned except for the clothes they were wearing." Ex. 139. According to Garner, Daniel was unable to recreate any records from personal files. *Id.* Garner's response failed to address why the financial statement was not in Daniel's credit file, nor did it address Daniel's earlier contention that the information was with his accountant.

Daniel even refused a request by the Bank's senior credit administrator in August, 1990, to recreate the statement to the best of his ability. Duchscherer Decl. ¶ 39. Daniel stated that he had no papers of any kind or "anything for that matter" to recreate a statement and that it would be impossible to do so. However, Daniel could have obtained a copy of his April, 1988 filing with the bankruptcy court. Daniel responded that his financial statement had been in his credit file, and "believed" the OCC copied it during the 1988 examination, but failed to replace it back in the file. *Id.* Daniel's "belief" was self serving and erroneous, as examiners never even saw the statement, much less copied it. *Id.* ¶ 40. At no time during the six months in which examiners repeatedly asked Daniel to provide the financial statement, had he claimed that examiners already had a copy and neglected to replace the original back into the credit file. Daniel's and Garner's actions here further demonstrate the manner in which they withhold information from examiners.

In light of the severity of the matter, Daniel Pearson, Director of Bank Supervision and Analysis for the Western District ("Pearson"), wrote a letter to each Bank director in March, 1991, and advised them of the inconsistencies found between records Daniel filed with the Bank, and those he filed with the bankruptcy court. Ex. 143. Pearson advised each of the directors of the OCC's concern on this matter and asked the directors to address the issues immediately. Further, Pearson informed each of them that the OCC would pursue stronger administrative actions in the event the issues were not addressed by the board. Despite the concern expressed by the agency, and the risk facing the Bank, no member of the board ever responded to the letter, nor was any mention of it ever addressed in the board minutes. Duchscherer Decl. ¶ 42. The board's refusal to address the concerns outlined in Pearson's letter continued the concealment and was clearly unsafe and unsound, and further demonstrates the board's refusal, or inability, to execute its fiduciary duties.

5. Daniel Received Loans From The Bank In Violation Of Statutes and Regulations Governing Insider Related Transactions At The Time The Bank Concealed His Executive Officer Status and Bankruptcy.

The five loans to Daniel discussed below were made to Daniel at the time the Bank was concealing Daniel's executive officer status from the OCC. Thus, examiners did not review Daniel's loans as insider related transactions. Moreover, none of the loans to Daniel conformed to the regulations governing insider transactions. In addition, one of the loans was made, and three renewed after Daniel filed for personal bankruptcy in April, 1989. The bankruptcy was also concealed from examiners. *See supra* at 45-49.

In addition to the concealment of Daniel's executive officer status and his April, 1988 bankruptcy filing, Daniel's true financial condition was concealed from examiners as well. Daniel obtained a number of loans totalling approximately $416,500 (approximately $200,000 of this amount was outstanding at the time Daniel filed for bankruptcy in April, 1988.) In addition to being unsafe and unsound, these loans violated 12 U.S.C. §§ 375a, 375b, and 12 C.F.R. §§ 31 and 215. As detailed below, several of these loans were made to Daniel while he was in bankruptcy. Bank records, however, failed to acknowledge the bankruptcy, as well as other significant changes in Daniel's financial condition.

Loan # 1

On March 10, 1984, Alyda Garner signed a $100,000 note for the stated purpose of constructing a home in New Jersey. Daniel guaranteed the loan, and the Bank relied on Daniel's August 31, 1983 personal financial statement. Ex. 144; Ex. 145; Ex. 146. The source of repayment was to be "from the sale of current residence/collateral." Bank records state that the loan was "originated and promoted by Gerald Garner." Ex. 147.

The loan proceeds, totalling $98,300, were advanced via two cashiers checks payable as follows: (1) $95,000 to Alyda Garner; and (2) $3,300 to Garner, Kreinces, Lichtenstein, Schindel & Ginsberg (Garner's law firm in New York at the time). Ex. 149. Both cashiers checks were deposited on the same day (March 19th) to an account at the Bank titled "Garner and Kreinces Client Trust Account." Ex. 150. The endorsements on the cashiers checks appear to be in Garner's handwriting. Duchscherer Decl. ¶ 50. Three days later, on March 22nd, the funds ($98,300) were transferred to another account at the Bank titled "Law Office of Garner, Kreinces, Lichtenstein and Schindel." Ex. 151. Garner immediately withdrew $93,000 of those funds on the same day (March 22nd) with two counter checks ($59,000 and $34,000, respectively) *dated March 19th* and payable to what appears to be his law firm in New York. Duchscherer Decl. ¶ 51. Garner then deposited these funds into another bank. *Id.*

Examiners were informed by a Bank officer during a later examination that the loan proceeds were never intended to pay for Daniel's home, and were instead used by the Garners for investment purposes. *Id.* ¶ 52.

In response to the examiners' request for additional documentation to support the loan, Garner provided them with a copy of a construction agreement. Ex. 153. However, the name of the general contractor on the construction agreement was crossed out, concealing the name of the general contractor, and preventing examiners from checking with the contractor. *Id.*; Duchscherer Decl. ¶ 53.

The loan was renewed on April 15, 1985. Ex. 154. Credit file documents show that the Bank continued to rely on Daniel's August, 1983 financial statement and a 1982 tax return, although both documents were clearly outdated. The file also stated that "Daniel is SVP/Administrator of ACNB and was 100% owner of Honeycomb Inc . . . which he has sold."[25] Ex. 155. The Bank's failure to obtain Daniel's up to date financial statement was unsafe and unsound, and in violation of 12 C.F.R. § 215.

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[25] Daniel's August, 1983 financial statement failed to state that Daniel's business in New York, Honeycomb Inc., was forced into bankruptcy by creditors in June, 1984, and that judgments in excess of a million dollars had been entered against him. Duchscherer Decl. ¶ 54. The credit file's assertion

The loan was again renewed on April 10, 1986, at a balance of $98,000, and was paid off on July 25, 1986. Ex. 34; Ex. 35.

Loan # 2

On June 27, 1986, Daniel received a $35,000 unsecured loan for the stated purpose of supporting various business investments. Ex. 157; Ex. 158. The proceeds were transferred to a law firm in California. Ex. 159. The stated source of repayment was return on investments, regular income, and assets. In making the loan, the Bank again relied on Daniel's outdated 1983 financial statement, and an incomplete 1985 joint tax return for him and his wife.

The loan was renewed on August 1, 1987. Ex. 161. Daniel provided a December 31, 1986 financial statement stating that he did not guarantee any loans other than one to Maloney's Fine Dining (discussed *infra* at pgs. 79-93.) Ex. 162. Daniel failed to disclose in his financial statement that he was personally liable on a guarantee dated January 25, 1983, to a former business associate in New York, in excess of one million dollars.[26] Duchscherer Decl. ¶ 61.

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that Daniel had "sold" the business concealed from examiners the true nature of Daniel's financial status, and therefore the risk of the loan.

[26] Daniel was sued on the guarantee, and a judgment was later filed against him for approximately $1.2 million in February, 1987.

The loan was renewed on August 24, 1988, with an unsecured loan to Daniel for $6,621. Ex. 168. There was no mention made anywhere in the file of Daniel's bankruptcy, which he had filed just four months earlier. As stated above, Garner admitted to examiners that he had concealed information relating to the bankruptcy. Daniel paid the loan off on May 10, 1989.

Loan # 3

On August 20, 1986, Daniel received a loan for $127,500 for the stated purpose of providing working capital to fund investment activities for the coming year. Ex. 170. Repayment was to come from investment and dividend income, *executive* compensation (at the same time Garner and other board members contended that Daniel was *not* an "executive" officer), and the sale of collateral. *Id.* The loan was partially secured by a pledge of UPS stock held in the name of Garner Family Trust # 2, of which Garner was co-trustee. *Id.* Although Bank records state that the Bank relied on Daniel's July, 1986 financial statement, no such document was ever located. Duchscherer Decl. ¶ 68. The proceeds of the loan were transferred to Daniel's personal account at Mitsubishi Bank. Ex. 171.

The loan was renewed on September 1, 1987, to Daniel and his wife, Alyda. Ex. 172. There was no credit report prepared for this renewal. The Bank relied on the same credit report it had relied on a year earlier. Ex. 173. Daniel was not required to provide an updated financial statement, nor was the July, 1986 statement that the Bank supposedly relied on ever located. Duchscherer Decl. ¶ 68.

The loan was paid off on February 29, 1988, from proceeds of a loan to Daniel's brother Harvey Garner and Harvey's wife, Dale, for $127,500 ("Harvey Loan"). The stated purpose of the Harvey Loan was to pay off "existing loan." Ex. 176. Bank records show that the Harvey Loan went to pay off the loan to Daniel and Alyda. Ex. 177. The Harvey Loan was collateralized with UPS stock pledged by G Family Trust # 2, of which Garner was co-trustee. Ex. 176. Repayment of the Harvey Loan was to come from investment and dividend income, executive income, and sale of shares. Ex. 178. The Bank relied on a March, 1987, credit memo. Bank records indicate that a TRW report was run and was found to be "clear." *Id.*

On April 15, 1988, Daniel paid $74,000 towards the Harvey Loan. Ex. 179. As of September 30, 1992, the Harvey Loan had an outstanding balance of $48,573. Ex. 181. Bank records indicate that the collateral supporting this loan (UPS stock) was released in May, 1992. Ex. 180. As a result, the loan is currently unsecured.

Loan # 4

On September 26, 1986, Daniel and his wife, Alyda, received an unsecured loan for $50,000 for the stated purpose of funding a capital investment. Ex. 182. Repayment was to come from investment and dividend income, *executive* compensation, and conversion of assets. Ex. 183. The assets were not identified, nor was the capital investment identified for which the money was loaned. The proceeds were deposited into Daniel's personal account at the Bank and were transferred to an account of Anderlou Development Company. Ex. 184. The funds were then transferred to the account of Maloney's Fine Dining. *Id.* In making the loan, the Bank relied on Daniel and Alyda Garner's outdated 1983 financial statement, and an outdated October 8, 1983 TRW report run on Daniel.

The Bank renewed the loan on October 27, 1989, with an unsecured loan to Daniel for $36,000. Ex. 186. Again, there was no mention of Daniel's April, 1988 bankruptcy filing in the credit file. The loan was paid off on February 1, 1991.

Loan # 5

On April 29, 1988, Daniel received an unsecured 90-day note for $50,000 for the stated purpose of retiring an existing obligation. Ex. 192; Ex. 193. Although the obligation was not identified, credit file records indicate that the proceeds were used to make a payment on a Bank loan to Maloney's Fine Dining. Ex. 194. Repayment was to come from Daniel's personal income and the sale of assets. In making the loan, the Bank relied on Daniel's outdated December, 1986, financial statement. There was no mention at all in the credit file that Daniel had filed for personal bankruptcy just four weeks earlier.

The loan was renewed on August 25, 1988, with an unsecured loan to Daniel for $48,500. Ex. 195. Again, no mention of Daniel's bankruptcy was made in the file. Repayment was to come from Daniel's personal income of $140,000. Credit file records state that the Bank relied upon Daniel and Alyda Garner's October 25, 1987, financial statement for this renewal. Ex. 197. According to the loan credit memorandum found in the credit file, Daniel's October, 1987, financial statement showed he and Alyda Garner with a combined net worth of $1,104,000. However, just a few months prior to the loans being made, Daniel claimed in his bankruptcy filing to have only $9,000 in total assets, approximately $1.5 million in total liabilities, and claimed that his monthly expenses exceeded his monthly income. This information should have been in Daniel's loan file and should have been taken into account by the board when they approved this credit.

The loan was renewed on October 27, 1989 with an unsecured loan to Daniel for $40,500, and was subsequently paid off in February, 1991. Ex. 198.

Documents obtained outside the Bank show that Garner was apprised of Daniel's poor financial condition but never made this information a part of the Bank's official records. The Garners' repeated acts of withholding and concealing material and significant records was unsafe and unsound and constituted a serious conflict of interest. Without complete and accurate financial information, neither the board nor the OCC can accurately determine the true condition of Bank assets and, hence, cannot determine the true condition of the Bank.[27]

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[27] The loans discussed above, and others [sic] transactions discussed in this Decision are precisely the type of insider abuse that Congress addressed with the enactment of Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. No. 95630, § 110, 92 Stat. 3665. The loans granted to, or

6. Garner concealed His Ownership In KHO, circumventing Restrictions Of 12 U.S.C. § 375b And 12 C.F.R. § 215

Garner used his position in the Bank to conceal from examiners his interest in KHO, a law firm located in California.[28] Thus, examiners did not review KHO transactions as insider related transactions. KHO was allowed by the Bank to incur overdrafts an high as $52,000, and was also permitted to receive preferential Bank loans during a three year period from early 1985 through mid 1988. Duchscherer Decl. ¶ 93, Garner's concealment of his interest in KHO violated 12 U.S.C. § 375b and 12 C.F.R. § 215, constituted a serious conflict of interest, and was unsafe and unsound as examiners were prevented from fully assessing the risk to the Bank as a result of the preferential credit extended to KHO. Although Garner's concealment of KHO as a related interest dates back to 1985, it was not until 1989 that examiners learned of the concealment and potential risk faced by the Bank. *Id.* ¶ 96. Further, it was only after examiners were

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guaranteed by Daniel have all violated the executive officer borrowing limits imposed by 12 U.S.C. § 375a and 12 C.F.R. § 31.2, and all advances, with the exception of the first loan to Daniel, were made without the benefit of a current and detailed financial statement in violation of 12 U.S.C. § 375a. Additionally, the April 29, 1988, advance to Daniel for the benefit of MFD, violated 12 U.S.C. § 375b and 12 C.F.R. § 31 since interested parties did not abstain from voting on the credit. *See, supra* at 10 for a discussion on legislation regarding insider abuses.

[28] Examiners learned from sources outside the Bank in July, 1989 that, although Garner stated he had no interest in KHO after 1984, he in fact held a 35% ownership in the law firm in 1985 and a 45% ownership in 1986.

approached by sources outside the Bank in 1989 that Garner's concealment came to light. Garner's concealment in this case clearly demonstrates an ongoing pattern of concealment and falsification of Bank records, and raises serious concerns by the OCC as to the truthfulness and accuracy of information provided by the Bank to this day.

A review of the KHO credit file by examiners in 1989 revealed that the file contained only outdated and limited ownership information for the year 1985, with 35% of the firm's ownership unaccounted for. *Id.* ¶ 94. The file contained no documentation relating to ownership in 1986. *Id.*

When asked by examiners in September, 1989 whether he knew who hold the unidentified 35% ownership in KHO, Garner responded that he did not know who held the unidentified ownership. *Id.* ¶ 95. Garner stated that he had resigned from the firm in December, 1984, and had no interest after that time. *Id.* Garner's statements to the examiners were clearly false, as he in fact held the unidentified interest in the firm.

In addition to having a hidden interest in KHO, it is indisputable that Garner participated in the management of KHO after 1984. O'Brien Aff. ¶¶ 10-16; Baker Aff. ¶¶ 8, 10, 11, 15, 16. Specifically, Garner maintained a private office at KHO, and participated in managing the office through telephone calls and written instructions he delivered via Bank courier. Baker Aff. ¶ 8, 16. Garner regularly drafted letters and had them delivered to Redarle Baker ("Baker"), a secretary at KHO, with instructions for her to type the letters on KHO stationery as if O'Brien or Paul

Golub, another attorney at the firm ("Golub"), had written them. *Id.* ¶ 7. In addition, Garner instructed Baker to prepare various corporate documents for companies owned by him and his associates.[29] *Id.* ¶ 5. Garner also instructed Baker to prepare wills for a number of Bank directors and other Garner associates. *Id.*

Garner also oversaw KHO's payroll account and personally instructed employees on client billings and the payment of bills owed by KHO. Baker Aff. ¶ 8. Garner regularly wrote instructions to KHO attorneys on the firm's billing documents instructing them to increase their productivity. Ex. 260.

On or about June 14, 1985, Garner informed O'Brien that examiners were coming into the Bank. O'Brien Aff. ¶ 10. Garner told O'Brien that he (Garner) needed to cover an overdraft that KHO had at the Bank and told O'Brien that he needed him to take out a Bank loan on behalf of KHO to cover the overdraft. *Id.* After O'Brien expressed concern about his personal liability, Garner instructed him to draft a hold harmless agreement whereby the Bank would not hold O'Brien liable for the loan. *Id.* O'Brien drafted the agreement the same day, and Garner signed his name to it. O'Brien Ex. A. O'Brien then executed the note. O'Brien Ex. B.

On or about September 19, 1985, Garner again informed O'Brien that the KHO account at the Bank was overdrawn. O'Brien Aff. ¶ 12. Garner told O'Brien that bank examiners would ask questions about the overdraft and asked O'Brien to take out another loan on behalf of KHO to cover the overdraft, this time with Golub as a cosignor. Garner instructed O'Brien to draft another hold harmless agreement similar to the one drafted in June. O'Brien drafted the agreement, which Garner signed. O'Brien Ex. C. In exchange, O'Brien and Golub signed the note. O'Brien Ex. D. Neither the June 14th, nor the September 19th hold harmless agreement was found in the KHO credit file.

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[29] Among the companies were Maloney's Fine Dining (discussed *infra* at 81-96), Med-Law, Nipal Industries (Dr. Lapin's concern), the Dal Rae Restaurant (discussed *infra* at 73), Practice Associates, and Associated Partners (discussed *infra* at 65.)

Garner caused the Bank to waive fees owed by KHO. Duchscherer Decl. ¶ 93. In so doing, Garner personally benefitted at the cost of Bank. Garner's actions clearly constituted a conflict of interest, a breach of his fiduciary duty and put the interests of the Bank before his own, and not to abuse his position in the Bank to advance his personal gain.

Garner's concealment of KHO as his related interest prevented examiners from citing violations of 12 U.S.C. § 375b, 12 C.F.R. § 215, and assessing the extent of the unsafe and unsound nature of the KHO account. The Bank was again asked to provide ownership information on Associated in the September, 1992 ROE, which was received by the Bank in February, 1993. However, as in the past, the Bank responded by restating what examiners had been told before, and did not address the question of KHO ownership while it was a Bank customer. The Bank's response is a continuation of its concealment and refusal to provide information to the OCC.

7. Directors Concealed Their Interests In Associated Partners Of Coast Plaza

As discussed *supra* at 13, documents obtained outside the Bank show that Associated Partners of Coast Plaza Inc. ("Associated") is a company with present borrowings at the Bank of approximately $660,000. Ex. 2-A, 40-41. In September, 1992, examiners learned for the first time, from sources outside the Bank, that Garner was intimately involved in Associated and that other directors, including his wife Joan, held an interest in the company.[30] *Id.* When asked by examiners during the September, 1992 examination who owned Associated, the Bank's management offered conflicting information, indicating an active concealment by the Bank of Associated's ownership. Ekstrom Decl. ¶¶ 121-130. This concealment is unsafe and unsound, and further demonstrates how Garner and other board members use their positions in the Bank for their personal gain, and how examiners have had to rely on information obtained by sources outside the Bank to expose instances of insider self dealing.

On September 5, 1992, the Bank loaned Associated $450,000 to pay off a loan at another bank, United California Savings Bank ("UCSB"). Ex. 2-A, 40-41. The Bank secured the loan with a first mortgage on an office building, and relied on an outdated May 10, 1991 appraisal which valued the property at $825,000. An August 1, 1992 appraisal of the property obtained by UCSB, however, valued the property at only $500,000, a significant decline of $325,000. Ex. 2-A, 40-41. The Bank's failure to obtain a current appraisal of the property was not only unsafe and unsound, as it threatened the Bank's capital, it also violated 12 C.F.R. § 34.

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[30] Specifically, examiners learned that Associated is owned equally (25% each) by Dr. Ronald Lapin, director Gough, and director Kaller, and RSC Trusts 1, 2, and 3. Exhibit 23. Director Joan Garner is trustee of the RSC Trusts. Duchscherer Decl. ¶ 118. "RSC" denotes Garner's three children: Robyn, Scott and Craig.

The Bank's credit file contained no accurate and complete current ownership information on Associated. At the time the $450,000 loan was made in September, 1992, Associated had additional borrowings at the Bank of approximately $220,000 that were secured by junior liens on the same property. Ex. 2-A, 40.

As noted above, examiners learned from sources, outside the Bank in September, 1992 that Associated was a related interest of directors Joan Garner, Kaller, and Gough, and that Garner was handling Associated affairs.[31] Duchscherer Decl. ¶ 118. Examiners also learned that UCSB had refused to renew Associated's loan because Garner refused to provide ownership information to UCSB. Examiners also learned that Garner, in response to concerns by UCSB regarding a potential conflict of interest due to his connection with Associated, falsely represented to UCSB that the OCC had granted a waiver for the conflicts.

As set forth in the Ekstrom Declaration, ¶ 15, the Bank refused repeated requests by examiners to provide accurate and complete updated ownership information on Associated, and provided only an untitled and undated list purporting to be information on an entity that supposedly acquired Associated. To date, the Bank has refused to provided [sic] examiners with the information requested. As in most other instances discussed throughout this Decision, the OCC has had to rely on information obtained from outside sources to learn what the Bank clearly should have disclosed. The Bank was again asked to provide ownership information on Associated in the September, 1992 ROE, which was received by the Bank in February, 1993. However, as in the past, the Bank responded by restating what examiners had been told before, and did not address the question of who owns Associated. The Bank's response is a continuation of its concealment and refusal to provide information to the OCC.

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[31] UCSB was instructed to send copies of all Associated correspondence to Garner's personal P.O. Box in Anaheim. Ex. 253.

8. The Bank Concealed Bank Records Relating To Garner's 1991 $100,000 Bonus

The Bank concealed from OCC examiners documentation relating to the board's approval of a $100,000 bonus to Garner for the year 1991. Although the Bank has since claimed that the board reviewed the matter in November, 1991, no mention of such review was made in the minutes, nor was the Compensation Committee's Report on the matter filed with the minutes. Duchscherer Decl. ¶ 139. It was only as a result of the 1992 Investigation that examiners learned of the bonus.[32] When questioned by examiners in July, 1992, Bank President Hales stated that he had recently learned of the bonus only by reviewing the Bank's general ledger, and that the matter had never been discussed at any board meeting. *Id.* ¶ 136. Hales stated that if any report had been offered by the Compensation Committee, it would have been included with the board minute packet. *Id.* An inspection by examiners of the Bank's original board and committee minutes confirmed Hales' statement that the matter had never been discussed by the board. The minutes made no mention whatsoever of the issue.[33] *Id.* ¶ 139.

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[32] Examiners specifically asked the Bank to provide a listing of all executive compensation.

Director Helsing was questioned by examiners as well. Helsing stated that Garner's bonus *could have* been discussed during "executive session," but he assured examiners that the Compensation Committee would have handled the matter.[34] Helsing said he believed he recalled that a "verbal" report on the matter was given to the board in December, 1991 by director Gough, who was chairman of the Compensation Committee. *Id.* ¶ 137. Helsing offered no explanation as to why such "verbal" report would not have been mentioned in the minutes.

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[33] A subsequent inspection of the Bank's board and committee minutes provided by the Bank in response to an August, 1992 subpoena also confirmed that the issue of Garner's bonus had never been discussed and recorded by the board. *Id.* ¶ 139.

[34] According to Helsing and Hales, "executive session" consists of all the board members except the Bank's president, Hales. Helsing and Hales stated that confidential matters are discussed during the session, and that minutes of the discussions are not kept. Helsing stated, however, that no Bank decisions or policies are approved during the session. Duchscherer Decl. ¶ 138.

Finally, examiners questioned the Bank's Chief Financial Officer, Duncan, who stated that he was unaware of whether the board had addressed the issue of Garner's bonus, and stated further that he had discussed the issue only with Garner. *Id.* ¶ 138. Duncan told examiners that he knew of only one document that addressed Garner's bonus, that being a March 13, 1992 memorandum from Garner to Duncan instructing him to apply the proceeds of the bonus to an outstanding $100,000 loan Garner had with the Bank. Ex. 236. When asked whether other documentation existed on the subject, Duncan assured examiners that any documentation relating to the bonus would be in his files. Duchscherer Decl. ¶ 138. Duncan reviewed his files and confirmed that Garner's March 13, 1992 memorandum was the only document he possessed. *Id.*

Five months later, in December, 1992, examiners in Washington, D.C. learned from sources outside the Bank that Duncan had provided FDIC examiners with a document dated November 12, 1991, entitled "Compensation Committee Report" during its examination of the Bank a month earlier.[35] *Id.* ¶ 140. The one page document is signed by director Gough as chairman of the Bank's Compensation Committee, and states that the Bank's Compensation Committee reviewed a number of factors and recommended Garner's salary for 1992, and $100,000 bonus for 1991. Ex. 237. Duncan provided the document to FDIC examiners in response to their request for any documentation relating to Garner's compensation. Duchscherer Decl. ¶ 140. In fact, Duncan personally removed the document from his files to give to the FDIC examiners. Duncan, however, neglected to inform the FDIC examiners of his earlier representations to OCC examiners just four months earlier that no document other than Garner's March 13, 1992 memorandum to him addressed the issue of Garner's bonus. Duncan also did not explain to either FDIC or OCC examiners, who were on-site at the Bank at that time, how the newly found "report" ended up in his files, when only four months earlier, he confirmed that no documentation, other than the March 13th memorandum was there.

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[35] The FDIC's examination of the Bank was performed concurrently with the OCC's September, 1992 examination.

If in fact the Compensation Committee Report *is* genuine, and was presented to the board as the Bank now contends, the board clearly concealed the document by not including it in the board packet, and by failing to make any mention of it in the minutes. If, however, the document is *not* genuine, and was in fact drafted *after* the 1992 Investigation in response to OCC scrutiny, the board, and the Bank's chief financial officer, clearly attempted to conceal the fact that the board originally concealed its approval of the bonus, but has since falsified Bank records and misrepresented its records to federal regulators. In either event, the board and/or members of the Bank's senior management team concealed the matter from examiners.

The Bank was asked to address Garner's compensation in the September, 1992 ROE, which was received by the Bank in February, 1993. However, the Bank responded by restating what examiners had been told before, and did not offer any justification of Garner's compensation. In addition, the Bank did not address why the Compensation Committee Report was not part of the board minute packet, or made available to examiners. The Banks response is a continuation of its concealment and refusal to provide information to the OCC.

9. The Bank Refused To Provide Documentation Relating To The Medi-Fin Account.

Medi-Fin was a company wholly owned and controlled by Joan Garner that had borrowings of approximately $200,000 at the Bank. The loans have since been paid off. Duchscherer Decl. ¶ 120. During the June, 1990 examination of the Bank, examiners made repeated requests for the Medi-Fin loan file to the Bank's Senior Lending Officer William Kavanagh ("Kavanagh"). The Bank did not provide examiners with the file as requested. *Id.*

In an August 9, 1990, letter from Pearson to Garner, Pearson informed Garner that examiners had asked the Bank to provide the Medi-Fin loan file, but had not received it. Ex. 229. The Bank offered no response to Pearson's letter. Duchscherer Decl. ¶ 121.

When asked again to provide the file on August 30, 1990, Kavanagh informed examiners that although he had previously compiled a loan file for Medi-Fin, it contained no financial information on the company. This in and of itself constituted an unsafe and unsound activity by the Bank. Kavanagh informed examiners that although he had asked Joan Garner to provide a copy of Medi-Fin's 1989 federal tax return and fiscal statement, she failed to do so. *Id.* ¶ 122. Joan Garner's failure to provide this information was contrary to Bank policy and was clearly improper, especially in light of her position with the Bank and relationship with the company, and the fact that the OCC and Bank's Senior Lending Officer specifically requested the data.

The Bank was informed again during an exit review meeting that neither the Medi-Fin loan file, nor any financial information on the company had been provided to examiners. The Bank responded that examiners had previously removed the file, and asked that the file be returned. This assertion by the Bank is unfounded and false. *Id.* ¶ 123.

Examiners cited the Bank's refusal to provide the documentation in the June, 1990 ROE at pg. 12. The documentation was then requested again during the 1992 Investigation, but was not provided. Duchscherer Decl. ¶ 125. The documentation was most recently requested in the September, 1992 ROE, which the Bank received in February, 1993. However, as in the past, the Bank responded by restating what examiners had been told before, and offered no new information. The Bank's response is a continuation of its concealment and refusal to provide information to the OCC.

10. The Bank Refused To Provide Documentation Relating To The Dal Rae Restaurant Account

The Dal Rae Restaurant ("Dal Rae") was a related interest of director Joan Garner. It had borrowings of approximately $100,000 at the Bank, which have since been paid off. As set forth in the Duchscherer Decl. at ¶ 126, it appears that Garner exercised control over the restaurant before it filed for bankruptcy. During the June, 1990 examination, examiners asked the Bank to provide the Dal Rae loan file on several occasions. The Bank never provided the file to examiners and offered no explanation as to why it would not do so. *Id.* The file was again requested during the 1992 Investigation, and again in the September, 1992 ROE, which the Bank received in February, 1993. However, as in the past, the Bank responded by restating what examiners had been told before, and offered no new information. The Bank's response is a continuation of its concealment and refusal to provide information to the OCC.

11. The Bank Refused To Provide Examiners With A Management Study Performed By An Outside Consulting Firm

During the September, 1991, examination of the Bank, examiners made repeated requests for a management study that had been performed in 1990. The study was performed in response to OCC concerns about the quality of the Bank's management, in particular, Garner. Ekstrom Decl. ¶ 110. Examiners had originally requested a copy of the study during the September, 1991, examination. *Id.* The Bank's president, Hales, instructed examiners to speak with Garner about the request. Although several requests were made to Garner, examiners received no response from him, or anyone else in the Bank.

The Bank was again asked to provide a copy of the report during the 1992 Investigation. The Bank asserted that the report was subject to the attorney-client privilege, since it was made at the request of director Helsing, who also acts as the Bank's counsel on various matters. In a letter from Helsing to Duchscherer dated July 24, 1992, Helsing stated that the management study was requested by him as counsel for the Bank to assist him in advising the Bank on issues such an threats of regulatory action by the OCC against directors of the Bank. Ex. 261. However, Helsing later stated in a letter dated August 5, 1992, that he had never made such a request in writing, as he had first contended.

A factually based management study is not within the scope of the attorney-client privilege. *See UpJohn Co. v. United States,* 449 U.S. 383, 395 (1981) (attorney-client privilege does not protect disclosure of underlying facts by those who communicate with an attorney). Helsing's role on the board as director and counsel is being used by the Bank to employ the attorney-client privilege in an improper manner in order to conceal potentially damaging information about the Bank and its management from the OCC. The Bank was again asked to provide the management study in the September, 1992 ROE, which the Bank received in February, 1993. To date, the Bank has failed to provide the study, or address the issue in a response, thus demonstrating its ongoing concealment and refusal to provide information to the OCC.

12. The Bank Refuged To Provide Ownership Information For The Mediquip Account

Mediquip is medical leasing company with loans of approximately $550,000 at the Bank as of September, 1992. Duchscherer Decl. ¶ 130. Garner was instrumental in the establishment of Mediquip.[36] *Id.* ¶ 133. Specifically, examiners found a December 31, 1990 memorandum from Garner to Seagondollar that instructs Seagondollar on how to set up the company, and how shares in the company were to be issued. Ex. 234. Examiners discovered during the 1992 Investigation that ownership documentation representing a 16% ownership in the company was not included in the Mediquip credit file. Duchscherer Decl. ¶ 134. More than half of the remaining 84% of the company is owned by known Garner associates. *Id.*

Mediquip is in a weak financial condition. A review of Mediquip's financial statement clearly indicates that the company lacks the financial capacity to service its $550,000 in loans. Ex. 238. Several of the loans to the company are guaranteed by individuals who have no apparent affiliation with the company. One such example is a $290,000 loan for a computer which is guaranteed by Dr. Ron Lapin. Given Garner's history of concealing his interest in companies that receive loans from the Bank, examiners believe that Garner holds some or all of the remaining 16% ownership of the company.

The Bank was asked in the September, 1992 ROE, which the Bank received in February, 1993, to provide information concerning the ownership of Mediquip, and information to determine whether any Bank insider is connected with the company. To date, the Bank has failed provide the information, or to address the issue in a response, thus demonstrating its ongoing concealment and refusal to provide information to the OCC.

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[36] This documentation was found in the Bank's supply room away from the Bank's files in a locked cabinet drawer. Garner originally demanded that examiners not enter the room since it contained no Bank related information. Garner's representations were found to be false, as substantially all of the documentation found in the room was Bank related.

F. VIOLATIONS OF LAW OR REGULATION AND UNSAFE AND UNSAFE PRACTICES THAT HAVE RESULTED IN SUBSTANTIAL DISSIPATION OF THE BANK'S ASSETS OR EARNINGS

1. Definition Of Unsafe And Unsound Banking Practice

The term "unsafe or unsound banking practice," was authoritatively defined in a memorandum by John Horne, the Chairman of the Federal Home Loan Bank Board ("FHLBB"), during Congressional hearings on the amendments to the Federal Deposit Insurance Act that added the removal provisions:

> Generally speaking, an "unsafe or unsound practice" embraces any action, or lack of action, which is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk or loss or damage to an institution, its shareholders or the agencies administering the insurance funds.

112 Cong. Rec. 26474 (1966); S. Rep. No. 3158, 89th Cong. 2d Sess. (1966).[37]

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[37] The legislative history also contains examples of unsafe or unsound practices, including lax control of expenses, disregard of a borrower's ability to repay, inaccurate accounting procedures, and lack of a systematic collection program. 112 Cong. Rec. 25474 (1966).

The FHLBB construed this standard as focusing upon the *nature*, rather than the degree, of the departure from ordinary standards of prudent banking represented by the conduct at issue. By this, the FHLBB means that such a practice is unsafe and unsound when it has the *potential*, by its nature, to cause "abnormal risk or loss or damage" to an institution. The Board accordingly rejected the contention that in order to be unsafe or unsound a practice must already have threatened the financial integrity of an institution. Instead, the Board focused upon the potential of a banking practice for harming the financial condition of an institution rather than focusing only on damages which may already have been realized.

2. The Bank Filed A Frivolous Lawsuit Constituting An Unsafe And Unsound Action That Resulted In Substantial Dissipation Of The Bank's Assets

Contrary to safe and sound practices, the Bank filed a lawsuit in May, 1988, in which it had no legitimate interest, and which cost the Bank over $800,000 in settlement and legal expenses. No mention of the lawsuit was made in the Bank's minutes until three months after the case settled when examiners questioned the Bank's payment of legal fees. Examiners only learned of the Bank's involvement in the lawsuit after being informed of it by outside parties. The Bank's filing of the lawsuit was unsafe and unsound and exposed the Bank to subsequent legal actions. In addition, the Bank's failure to record any mention of the lawsuit in the Bank's minutes until three months after the lawsuit settled was contrary to safe and sound practices since the Bank's action was concealed from examiners, and the minutes failed to accurately reflect the activities of the board.

Dr. Donald Daniel ("Dr. Daniel") was one of the original organizers of the Bank and was a member of the board of directors from the Bank's inception until June, 1987. In 1981, Garner told Dr. Daniel that a company called "Med-Law" had over twenty years of experience in investing and servicing pension funds, and would act as Dr. Daniel's financial advisor. Dr. Daniel Aff. ¶ 5. Garner did not disclose to Dr. Daniel that Med-Law had just been incorporated and was owned and controlled by Garner and his wife Joan. *Id.* Dr. Daniel turned over his pension fund to Garner in August, 1981, with the expectation that Med-Law would manage the fund.

As set forth in the Dr. Daniel affidavit, Garner ignored Dr. Daniel's repeated requests to provide him with an accounting of the pension fund. As a result, Dr. Daniel filed a civil action in March, 1987 against Garner, Joan Garner, Med-Law and other parties for damages and for an accounting. Ex. 254. The Bank was not a party to the action. The Garners' were sued in their capacity as owners of Med-Law, and not in their Bank related capacities.[38] *Id.*

In May, 1988, the Bank filed an action against Dr. Daniel and his attorney in Orange County Superior Court. Ex. 126. Among other things, the Bank charged both Dr. Daniel and his attorney libeled and slandered the Bank.

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[38] Dr. Daniel filed a similar action in United States District Court, Central District in March 1989, citing violations of ERISA. Ex. 255.

The Bank did not respond to two discovery requests by Dr. Daniel and a court order to produce evidence in support of its case. Ex. 257. The court determined that the Bank's failure to comply with its order warranted sanctions and ordered that the Bank be precluded from introducing any evidence in support of its case.[39] *Id.* The Bank's failure to pursue its lawsuit, to the point of violating the court's order, bolsters the fact that the Bank's lawsuit was baseless and brought solely to intimidate Dr. Daniel into dropping his lawsuit.[40]

A settlement was reached between the parties in June, 1990, wherein Dr. Daniel received $475,000. Ex. 128 at 15-18. The settlement covered both Dr. Daniel's lawsuit against Med-Law, Garner and Joan Garner, and the Bank's lawsuit against Dr. Daniel and his attorney. *Id.* The Bank paid approximately $262,000 of the settlement and reimbursed Garner approximately $142,000 for his portion of the settlement. In addition, the Bank paid another $406,000 in legal fees for the case. *Id.*

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[39] On August 30, 1989, the court ordered the Bank to pay Dr. Daniel $450.00 in sanctions for its failure to respond to the first of Dr. Daniel's discovery requests. On November 7, 1989, the Bank moved for Relief From Waiver of Objections to Dr. Daniel's second discovery request. The Bank's motion was based wholly upon Garner's declaration that he forgot and/or misplaced the request and subsequently became ill, thus interfering with the Bank's ability to respond to Dr. Daniel's request. Ex. 264. However, deposition testimony taken of Garner's secretary revealed that Garner was in fact working full time during the time the Bank claimed he was too ill to assist the Bank in the suit. *Id.*

[40] In this regard, in July, 1987, Garner told a friend of Dr. Daniel's, Lynn Kirk ("Kirk"), that he intended to have the Bank sue Dr. Daniel and destroy his medical practice if Dr. Daniel insisted on suing him. Kirk Aff. ¶ 3. In addition, the person who was purported to have heard the "slander" stated the Bank was mistaken. Duchscherer Decl. ¶ 22.

In a September 10, 1991 letter from the board to William Stolte, Deputy Comptroller, Western District ("Stolte Letter"), the board stated that Garner did not seek, nor was he granted, any reimbursement by the Bank for his expenses relating to the defense and settlement of the lawsuit Dr. Daniel brought against Med-Law, Garner and Joan Garner. Ex. 124. However, the Bank did in fact pay 85% of the settlement to Dr. Daniel.[41] Duchscherer Decl. ¶ 24.

Although the OCC has raised concerns with the board regarding the Bank's involvement in this lawsuit, the board has not demonstrated that the Bank's payment of Dr. Daniel's settlement was Bank related. The board hasn't demonstrated that the lawsuit was Bank related or had merit. The fact that the Bank filed a lawsuit and failed to offer any evidence to support it, then paid more than $400,000 to settle the matter, and $400,000 in legal fees, further underscores the fact that the Bank had no legitimate interest in the lawsuit and never should have filed it. This action by the Bank was clearly unsafe and unsound and resulted in a substantial dissipation of the Bank's assets and earnings.

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[41] In the Stolte Letter at pg. 5, the board admits that the Bank retained and paid for counsel to represent Garner separately in the action.

Finally, as stated above, the fact that the board did not address the Bank's payment of the settlement in its minutes until three months after the settlement was reached, and only after examiners questioned the Bank's payment of legal fees, demonstrates an attempt by the board to conceal or delay disclosure of the Bank's involvement in the lawsuit and payments incurred. Ex. 128.

3. Bank Insiders' Involvement In Maloney's Fine Dining Was Unsafe And Unsound, In Violation Of 12 U.S.C. §§ 375a, 375b, 12 C.F.R. §§ 215, 31, And Resulted In The Dissipation Of The Bank's Assets

MFD was a restaurant venture and was a financially troubled borrower at the Bank. In July, 1986, Garner, Joan Garner, Daniel and director Kaller ("Insiders"), along with Garner's other brother, Harvey Garner and a Bank customer, William McNamara ("McNamara"), gained control over MFD, making it a related interest (as defined by 12 C.F.R. § 215.2(k), of each of the Insiders.[42] None of the insiders disclosed their interest in MFD as required. Scherf Decl. ¶¶ 14-16.

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[42] As set forth in the Maloney Affidavit, ¶ 8, Donald Maloney ("Maloney"), MFD's owner, informed Daniel in June, 1986, of his intention to place MFD into Chapter Eleven bankruptcy. Daniel instructed Maloney to do nothing until he had talked with his brother, Garner, who met with Maloney the next day and proposed a deal whereby new investors would invest funds into MFD in return for a controlling ownership. On or about July 1, 1986, Maloney executed a shareholders agreement ("Agreement") for MFD, at which time Daniel took over the operation of the restaurant. As part of the deal, Daniel instructed Maloney to put his wife, Alyda Garner, on the payroll

After gaining control of MFD, the Insiders immediately commenced a series of illegal and unsafe and unsound activities that resulted in a loss to the Bank of approximately $555,000, constituting a substantial dissipation of the Bank's assets and earnings. In addition, these activities constituted a serious conflict of interest as well as a breach of the Insiders' fiduciary duties to the Bank, its shareholders, and its depositors. The full extent of the Insiders' involvement in MFD, as detailed in this Decision, became apparent only after the extensive work performed in connection with the 1992 Investigation and, in part, with information obtained from sources outside the Bank.

Their positions as senior officers, directors and members of the Bank's Loan Committee gave the Insiders the control needed to ensure that loans, used for the benefit of their hidden related interest, were approved without question. Garner and Joan Garner sat on the Loan Committee (Joan as the Secretary) and, along with Daniel, attended almost every meeting where MFD loans were approved. Scherf Decl. ¶ 17. In no instance do the minutes ever disclose the fact that the insiders had acquired control of MFD, or that proceeds of loans were used to fund MFD, nor was the information disclosed in the borrowers' credit files. *Id.* This, despite the fact that in an eleven month period following the Insiders acquisition of

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of the restaurant although she did no work for the restaurant. Daniel's and Alyda Garner's joint tax return for 1987 shows Alyda as receiving $5,400 in wages from MFD.

the restaurant, approximately $360,000 in Bank loans were made to MFD, directly or through its controlling owners. *Id.* ¶ 18.

The Insiders' activities encompassed a multitude of illegal and unsafe and unsound practices, including the use of "nominee" loans, which were structured in a manner to conceal MFD's receipt of loan proceeds.[43] Specifically, the Bank loaned funds to borrowers who immediately re-loaned the funds directly to, or through a third party to, MFD. *Id.* ¶ 11. In no instance was disclosure ever made that the borrower would reloan the funds to MFD. Instead, purpose statements in most cases falsely stated that the loans were to be used for a business *investment*. In reality, the borrowers, having no need for the loan, merely acted as nominees on MFD's behalf. In misstating the purpose of the loans and concealing the fact that MFD was the ultimate recipient of the loan proceeds, the Insiders engaged in illegal and unsafe and unsound activities. Their actions concealed from other Bank directors and officers, as well as examiners, the true risk of the loan and level of MFD debt. In addition to being illegal and unsafe and unsound, the Insiders' failure to disclose their financial involvement with, and control over a Bank borrower, particularly one which was financially troubled, constituted a serious conflict of interest and breach of their fiduciary duty to the Bank and its depositors. Such concealment is consistent with the pattern of concealment and falsification of Bank records described throughout this Decision.

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[43] A "nominee" loan is a misapplication of funds wherein the true beneficiary of a loan is concealed. Such loans may be used to circumvent restrictions on how much an insider may borrower [sic], as well as restrictions on how much a bank may lend to any one borrower. Such loans are unsafe and unsound, since they disguise the actual risk involved with the loan.

In addition to the nominee loans, at least one account was opened at the Bank in at least one instance with a named account party (McNamara) having no knowledge of the account. *Id.* ¶ 17 at pg. 13. This account was used by Garner, to channel his personal funds from another bank to MFD and conceal his interest in MFD. *Id.*

In at least one instance, a credit file document was "doctored" to record a loan an approved at a Loan Committee meeting that was never held. *Id.* at pgs. 19-20. The loan was presented to the Loan Committee six months after the loan was made and only after examiners discovered its existence during the April, 1987 examination. *Id.*

Garner and Daniel also allowed MFD an "open line of credit" via overdrafts and unposted checks, the total of which exceeded $100,000 on numerous occasions. *Id.* ¶¶ 21, 22, 24. Such action was illegal and unsafe and unsound, and resulted in further dissipation of the Bank's earnings. *Id.* ¶ 24.

As set forth below, and in further detail in the Scherf Declaration, ¶ 17, pg. 13, the following transactions occurred immediately after the Insiders gained control of MFD:

> (1) On or about July 9, 1986, the Bank booked a $25,500 unsecured loan to director Kaller. Bank records state that the proceeds were to buy some supplies and equipment related to (Kaller's) business., Scherf Decl. ¶ 17, pgs.

11-12. The proceeds were disbursed by a cashiers check payable to "M.F. Inc." [sic] and were deposited to MFD's account without endorsement on the same day. The MFD credit file contained instructions from Garner to loan officer Kavanagh regarding the amount, purpose ("business investment"), and terms of the loan. Kaller's February 1987 financial statement gives no indication of his financial involvement with MFD.

(2) On or about July 18, 1986, a deposit account titled "Harvey Garner & William McNamara as TTEES for Maloney's Fine Dining Inc." ("Trustee Account") was opened at the Bank. *Id.* at 13. A signature card for this account could not be found at the Bank. *Id.* McNamara had no knowledge of the account. The account was opened with a $25,000 check of McNamara's drawn from another bank. Daniel instructed that approximately $23,000 be transferred to MFD's account from the Trustee Account. The Trustee Account was closed on or about August 13, 1986; reopened on or about November 10, 1986, when proceeds of a loan to William McNamara were deposited into it and transferred to MFD; then closed again on or about April 4, 1989. The account was dormant from December, 1986 until it was closed. Garner also transferred funds into the Trustee Account that were subsequently transferred to the MFD account (discussed below in item 3 and 4). *Id.*

(3) On July 25, 1986, Garner's $25,000 personal check drawn on an account at another bank, payable to Daniel, was deposited to the Trustee Account. On the same day, $15,000 of the proceeds was transferred to MFD's account,

and another $6,650 of the proceeds was transferred to MFD's account four days later. Both of these transfers were done at Daniel's instruction. *Id.* at 14.

(4) On July 31, 1986, another $25,000 check from Garner's drawn on an account at the other bank, payable to Harvey Garner, was deposited to the Trustee Account. Approximately $27,000 in additional funds were then transferred to MFD's account at the instructions of Daniel.

(5) On August 8, 1986, another $25,000 check of Garner's drawn on his personal account at the other bank was deposited directly into MFD's account. The check bears the notation "G Family # 2." On August 22, 1986, another $25,000 check of Garner's drawn on the same personal account at the other bank and payable to MFD was deposited into MFD's account. The check bears the notation "loan to DM." Thus, by August 22, 1986, funds drawn on Garner's personal account at another bank had provided $100,000 in funds for the MFD account.

(6) On August 29, 1986, a $15,000 check of Daniel's drawn on his personal account at another bank was deposited into an account at the Bank in the name of Anderlou Development Company ("ADC").[44] The check bears the notation "loan." On the same day, a $15,000 check of ADC's, signed by Alyda Goldstone, payable to MFD, and bearing the notation "Loan" was

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[44] ADC appears to be a related interest of Daniel Garner's; his spouse, using her maiden name Alyda Goldstone, is named signatory for the account. ADC's address at the Bank was the same as Garner's law firm in New York.

deposited to MFD's account. In November, 1986, MFD wrote a $15,000 check to ADC bearing notation "Loan Repayment dated Aug 30, 1986." ADC then wrote a $15,000 check to Daniel (notated as "Loan Repayment"). On November 28, 1986, a $13,500 check of Daniel's drawn on his account at another bank was deposited to ADC's account at Bank. On the same day, a $15,000 check of ADC's was deposited to MFD's account.

(7) On or about September 29, 1986, the Bank booked a $50,000 unsecured loan to Daniel for the stated purpose of funding a capital investment. *Id.* at 16-17. $49,000 of the proceeds was deposited on September 30th to his personal account at the Bank. On September 30th, a $49,000 check signed by Daniel, payable to ADC, and bearing the notation "Loan," was deposited to ADC's account. On the same day, September 30, 1986, a $49,000 check of ADC's, signed by Alyda Goldstone, payable to "Maloneys," and bearing the notation "Loan" was deposited to MFD's account. Daniel's statement that the purpose of his loan from the Bank was to fund a capital "investment" was misstated, an they were instead used for a loan to MFD.

(8) On or about October 29, 1986, the Bank booked a $25,500 unsecured loan to director Kaller, of which $25,000 was deposited to his account the same day. The stated purpose of the loan was for business investment. The next day, Kaller's wife wrote a $25,000 check on the account, payable to MFD, and bearing the notation "Loan." As with the preceding loan to Daniel, Kaller's statement that the purpose of his

loan from the Bank was for business "investment" was misstated, as the funds were used by him to loan to MFD.

(9) On or about October 29, 1986, the Bank booked a $51,000 unsecured loan to Harvey Garner, of which $50,000 was deposited to his account the same day. The stated purpose of the loan was for investment purposes. On or about the next day, Harvey Garner's wife wrote a $50,000 check on the account, payable to MFD, and bearing the notation "loan." As with the preceding two loans, the stated purpose was misstated, as the funds were instead used by him to make a loan to MFD.

(10) On or about November 10, 1986, the Bank booked a $25,500 unsecured loan to William McNamara ("McNamara"), of which $25,000 was deposited on November 12, 1986, to a "William McNamara" account at the Bank. The stated purpose of the loan was to make a business investment. The account was opened on November 12, 1986. The account was then charged on November 12, 1986, for a $25,000 check payable to MFD which was deposited to the Trustee Account (discussed above in item (2)). The McNamara account was then closed on the same day. On November 17, 1986, the $25,000 was transferred from the Trustee Account to MFD's account. The transfer document shown "D.G." as the requesting person. A memorandum found in the credit file, dated June 25, 1986, from Garner to Kavanagh (who was president at the time), provides instructions with respect to the terms of a $25,000 loan to McNamara and requesting Kavanagh to review and evaluate all financial statements. The

November 12th $25,000 transactions in the "William McNamara" account are the only transactions known to have occurred.

(11) On or about December 31, 1986, the Bank booked a $50,000 loan directly to MFD. The loan was guaranteed by Daniel, but the only guarantor shown on the "Branch Loan Credit Report" ("BLCR") is Donald Maloney.[45] Another name was originally on the BLCR as a guarantor, but was either whited out or erased. The loan was paid by Daniel on April 29, 1988, when he obtained a $50,000 unsecured loan from the Bank while he was in Chapter Eleven Bankruptcy. The BLCR records approval of MFD loan at a loan committee meeting that never took place. After discovery by examiners during the April, 1987, examination, the Loan Committee discussed the loan at a June, 1987, meeting. Statements made during that meeting show that the loan had not been previously presented for approval. One of the committee members, director Helsing, stated that he only recently realized Daniel's interest in MFD. *See* item 16.

(12) On or about December 31, 1986, a $5,000 check from Nipal Industries Ltd. was deposited into MFD's account. (Nipal Industries Ltd. was owned by Dr. Ron Lapin.) The check was payable to Maloney, with the notation "consulting fees." The check appears to have been signed by Garner. Scherf Decl. ¶ 17, pgs. 19-21.

(13) On or about March 11, 1987, the Bank booked a $203,333 loan to G. Family Trust # 1

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[45] The BLCR is a credit file document used by the Bank to record borrower and loan information including the date of loan committee approval.

("Trust"). Garner is the beneficiary of this trust; Daniel and Harvey Garner are the co-trustees. Garner instructed Kavanagh on the terms of the loan and stated that the loan was "solely for the benefit of the irrevocable trust." $100,000 of the proceeds were deposited to the Trust's account at the Bank. On March 12, 1987, two checks were charged to the trust's account: (a) a $60,000 check, dated March 11, 1987, and signed by Daniel as trustee, payable to G. Family Trust #1 and deposited to the Trust's account at another bank; and, (b) a $33,000 check, dated March 10, 1987, and signed by Harvey Garner as trustee, payable to Daniel and deposited to his personal account at the other bank on or about March 12, 1987. On March 11, 1987, a $33,000 check of Daniel's drawn on the same personal account of his at the other bank, and bearing the notation "Loan," was deposited to MFD's account.

(14) On March 19, 1987, two checks, one for $33,000 and one for $9,000, and on March 20, 1987, a check for $24,000 ($66,000 total), were deposited to MFD's account. The checks for $33,000 and $24,000 were drawn on Daniel's personal account at another bank and bear the notation "loan." (The source of the $9,000 check could not be determined.)

(15) On or about April 23, 1987, the Bank booked a $50,000 unsecured loan to Harvey Garner for the stated purpose of business investment. $48,985 of the proceeds was deposited to Harvey Garner's account on April 23, 1987, and, on the same day, $49,000 was transferred to MFD, via a check bearing the notation "loan." A March 31, 1987 financial statement for Harvey

makes no mention of a financial relationship with MFD.

(16) On or about May 21, 1987, the Bank booked a $50,000 loan to Family D.G. Trust ("The Trust"), and the proceeds were deposited to The Trust's account at the Bank on May 21, 1987. (Harvey Garner and his wife are the trustees of The Trust.) On the same day, The Trust wrote a $50,000 check payable to Daniel, which was deposited to his personal account at another bank on May 22, 1987. That same day, May 22nd, Daniel wrote a check on the same account for $50,000, payable to MFD with the notation "Loan," which was deposited to the MFD account at the Bank.

(17) On or about April 29, 1988, the Bank booked a $50,000 unsecured loan to Daniel. Proceeds were used to pay off a loan to MFD which he had guaranteed. *See* item 11. As discussed *supra* at 58, this loan was made to Daniel a few weeks after he filed for bankruptcy. (Daniel's bankruptcy was not disclosed in his credit file, nor in the Bank's minutes.) In making this loan, the Bank relied on Daniel's outdated December 31, 1986 financial statement, and on two outdated tax returns, 1985 and 1986.

The above extensions of credit, booked by the Bank during the period July, 1986, through May, 1987, approximated $360,000. These represent extensions of credit to, or for the benefit of, an undisclosed related interest of the Insiders. Scherf Decl. ¶ 18.

Despite the numerous loans and subsequent transfers of proceeds to MFD, the MFD account was in an overdrawn status for most of the time during the period

August, 1986, through April, 1987, and was almost continuously overdrawn from December, 1986, through April, 1987. *Id.*, ¶ 21. Rejected items occurred on almost a daily basis during the latter period. *Id.* Most of the records regarding rejected items prior to December, 1986, were not available. However, what was available indicates the same pattern of activity. *Id.* ¶ 22. For the period of December, 1986, through April, 1987, the total of the rejected items plus the amount of the overdrafts for MFD exceeded $100,000 on a number of days and exceeded $50,000 on numerous occasions. *Id.*

The transactions detailed above represent an illegal and unsafe and unsound use of Bank funds. These transactions were executed in violation of 12 U.S.C. §§ 375a and 375b, and 12 C.F.R. §§ 31 and 215, and constituted an egregious breach of the Insiders' fiduciary duties to the Bank, its shareholders and its depositors, as well as a blatant conflict of interest that was concealed from examiner review.

The handling of the MFD account shows that MFD effectively had an "open line of credit" at the Bank with no evidence of a written board approved lending arrangement in place. Despite the large and almost continuous overdrafts and a large volume of transactions, the account was assessed only the normal service charge. This practice contradicted safe and sound banking practices and constituted a conflict of interest, as the account should have been charged the higher of the normal account service/overdraft fee or the interest rate charged on higher risk commercial loans. *Id.* Such practice demonstrates another example where the insiders benefitted at the cost of the Bank.

On or about January 15, 1988, Maloney placed MFD into Chapter Eleven bankruptcy. *Id.* ¶ 17, pgs. 25-26. Maloney filed as the sole shareholder of MFD.[46]

On or about February 8, 1988, the MFD deposit account at the Bank was overdrawn by approximately $18,000. The account was closed and the amount of the overdraft was transferred to a general ledger suspense account and was carried there for nearly nine months, creating, what was in effect, an interest free extension of credit in violation of 12 U.S.C. § 375b and 12 C.F.R. § 215.

On or about October 28, 1988, the Bank charged off the $18,000 suspense item plus approximately $373,000 in loans. *Id.* ¶ 32. The Bank subsequently recovered approximately $55,000. The net charge off on loans for MFD was approximately $318,000 plus interest. *Id.*

A company named Tantalizing Inc. ("TI") purchased, for $520,000, the assets of MFD out of bankruptcy. TI paid $20,000 down with the Bank financing $500,000 of the purchase via a non-booked loan which TI executed with the Bank in October, 1988. The Bank expensed approximately $160,000 in connection with the purchase. *Id.* ¶ 40. A $10,000 payment was made on the TI loan in February, 1989, and shortly thereafter, the loan went into default. *Id.* ¶ 38. The Bank sold the restaurant's furniture and fixtures for $32,000 in June, 1990.

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[46] The other parties to the Agreement were not considered owners in MFD since the transfer of MFD stock was never filed with the State of California. Daniel and other parties to the Agreement attempted to have the bankruptcy dismissed on the grounds that Maloney lacked authority, as he was not a majority stockholder. The court held in favor of Maloney.

On or about July 2, 1990, the Bank paid a $35,000 settlement in connection with a lawsuit brought by another bank which was a participant in one of the MFD loans. In addition, the Bank paid approximately $23,500 in legal fees in connection with the suit.

In summary, the Insiders who gained control of, and used the Bank to *finance* MFD, committed numerous unsafe and unsound acts and violated many of the statutes and regulations designed to control insider abuse. Bank losses (loan charge offs and expenses) connected with MFD related activities were substantial, approximating $555,000. The losses are undoubtedly the result of the illegal and unsafe and unsound acts of the Insiders. Once the Insiders acquired control of MFD, the nature of the Bank's pre-existinq lending relationship was irretrievably lost. The Bank as an independent lender was supplanted by the Bank insiders who exercised control over the activities of both the Bank and MFD. MFD was operated in accordance with the dictates of the new owners who, in effect, usurped the Bank's legitimate interest in remaining independent of the borrower. As a result, MFD's financial and operational characteristics changed dramatically. Foremost among these changes was MFD's significantly increased debt (loans by the new shareholders) and its unrestricted access to Bank credit via overdrafts and unposted checks. Thus, the losses must be attributed to the Insiders' illegal and unsound activities which constituted a blatant abuse of their authority at the Bank and placement of their own financial interests above those of the Bank. Additionally, an undetermined amount of interest was lost on preferential extensions of credit made via overdrafts and cash items. The extensions of credit and other activities described above with respect to MFD clearly demonstrate a disregard for the fiduciary duties imposed on bank officers as well as a circumvention of those banking statutes specifically designed to prevent abusive insider practices.[47]

4. The Bank's Payment Of Garner's Personal Legal Expenses In Relation To His New York Disbarment Proceeding Violated 12 C.F.R. § 7.5217, And Was An Unsafe And Unsound Practice That Resulted In Substantial Dissipation Of The Bank's Assets

The Bank improperly paid Garner's personal legal fees incurred in connection with his disbarment proceeding in New York State. Garner was disbarred on February 10, 1992 for submitting false information to the OCC on two Confidential Biographical and Financial Reports ("Reports") in 1983 and 1984. Ex. 239. Garner, who was nominated by himself and the Bank's other organizers to be Chairman of the Board of the Bank, was required to submit these Reports to the OCC.

As set forth in the Stolte Letter, the Board admitted paying the legal expenses incurred by Garner in his New

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[47] In addition to MFD, examiners learned that the Bank insiders involved themselves in at least two other restaurants in a similar manner as with MFD. These two restaurants were the Dal Rae (discussed *supra* at 73), and the Mamaroneck Inn. In light of the resources necessary to fully investigate these matters, examiners have not yet fully documented the activities. To date, however, examiners have determined that the Bank has expended approximately $265,000 in legal fees and settlement costs in relation to one of these restaurants (Mamaroneck Inn).

York State disbarment proceeding. Ex. 124. The board stated in the Stolte Letter that it paid Garner's legal fees for his disbarment proceeding because its Articles of Association and bylaws required the Bank to:

> indemnify an officer or director of the Bank against all expenses reasonably incurred by such person in connection with any threatened or pending suit or proceeding, whether civil, criminal, administrative or investigative, by reason of the fact that he is or was a director or officer of the Bank.

Id.

The board further stated that Garner's application to become a director and officer of the Bank was at the request, and on behalf of the Bank, and therefore Garner was entitled to indemnification. According to the board, the only basis of the disbarment proceeding was the OCC's allegation that Garner had falsified OCC documents.

Legal billing statements provided to the OCC by the Bank in early 1993 show that between January 1989 and May 1990, the Bank paid at least $15,000 in legal fees in connection with Garner's disbarment. Duchscherer Decl. ¶ 18. The payment of these fees was never disclosed prior to the Stolte Letter. *Id.* ¶ 19.

Garner was not entitled to indemnification for legal fees arising from his disbarment proceedings for a number of reasons. First, mere status as a director or officer does not entitle a person to indemnification.

Under both the Bank's Articles of Association and California corporation law, a director or officer is only entitled to indemnification if he is sued "by reason of the fact that he is or was a director or officer of the Bank." Bank's Articles of Association; *see also* Cal. Gen. Corp. L. Code § 317 (West 1990).

The courts have interpreted the requirement of a relationship between the suit and the individual's status as a director or officer for the purpose of indemnification as requiring a *direct* nexus between the party's status as a director or officer and the litigation itself. It is not enough that the activity have *some* relationship to the individual's activity as a director; the individual's activities as a director or officer must *be* the basis for the suit. *See Petty v. Bank of New Mex Holding Co.*, 787 P.2d 443 (N.M. 1990) (holding that directors who sued in their capacities as shareholders were not entitled to indemnification); *Sorenson v. Overland Corp.*, 242 F.2d 70 (3d Cir. 1957) (denying the plaintiff indemnification because the plaintiff's employment contract with the corporation, which he entered into prior to employment with the corporation, was made in his individual capacity and not as a director); *H.R. Plate Sun-Diamond Growers of Ca.*, 275 Cal. Rptr. 667 (Cal. Dist. Ct. App. 1990) ("Sun-Diamond") (holding that former officers were not entitled to indemnification because the former directors were not acting within the scope of their agency in inducing the corporation to breach a contract so that the services could be performed by the former officers' new corporation).

Garner's disbarment proceeding was not based on his activity as a director at all, but, rather, on his failure to live up to the standards of the New York State Bar.

Garner's falsification of information was neither connected with activities of the Bank, nor was it done to further the interests of the Bank. The New York State Bar sued Garner in his personal capacity as a lawyer licensed to practice in the state of New York, not as a director of a national bank in California. The mere fact that the basis for Garner's disbarment was a Bank-related document and that the document was filed pursuant to banking laws does not provide the necessary nexus for indemnification. In both *Petty* and *Sorenson, some* relationship between the suit and the individual's activities as directors existed, but, as in Garner's situation, the suits were not directly connected to activities performed as directors. Additionally, in *Sun-Diamond,* the court explains that the former directors were not entitled to indemnification because the activity sued upon was for their own personal benefit and not in furtherance of the corporation's policies or objectives. 275 Cal. Rptr. at 672. Likewise, Garner's misrepresentations were to benefit him personally and certainly were not in furtherance of the Bank's policies or objectives. In fact, Garner's misrepresentations were in contradiction of the Bank's interest in being run in a safe and sound manner by management with a high level of integrity. Furthermore, his defense of the disbarment action was to protect his position as an attorney, not as a banker.

Second, most Jurisdictions require that in order to receive indemnification, the director or officer must have acted in good faith and in a manner that the person believed was in the best interests of the corporation. *See* Revised Model Business Corp. Act § 8.51(a) (1985); *see also* Cal. Gen. Corp. L. Code § 317(b); *Sun-Diamond,* 275

Cal. Rptr. 667. The court explained that an individual should not be considered acting in good faith "where the facts indicate that the [officer or director] intentionally participated in illegal activity or wrongful conduct. . . . " *Id.*, at 672. Garner's falsification of documents filed with the OCC was clearly wrongful conduct, thus, precluding a good faith argument, and certainly was not in the best interests of the Bank.

Third, the board's statement in the Stolte Letter that Garner applied to become a director of the Bank at the request, and on behalf of the Bank, is erroneous. Just the opposite occurred: it was Garner who applied to have the Bank chartered. Furthermore, the bylaws that the board relied on to reimburse Garner did not even exist at the time Garner falsified his 1983 Confidential Biographical and Financial Report.

Finally, California law permits indemnification if approved by a majority vote of disinterested directors or disinterested shareholders, or if ordered by a court. Cal. Gen. Corp. L. Code 317(e). However, such approval is subject to the requirements that the party acted in good faith and acted in a manner that the person believed was in the best interests of the corporation. As discussed above, Garner neither acted in good faith, nor in the best interests of the Bank. Consequently, even if the payment of legal expenses had been approved by the appropriate parties, any such approval was clearly not based on the appropriate factors. Moreover, no such approval is recorded on the Bank's records; the Board of Directors merely "admitted" in September, 1991 that they had indemnified Garner.

Accordingly, any indemnification by the Bank of Garner's legal fees incurred in relation to his disbarment proceeding were contrary to the Bank's own Articles of Association, general corporation law, and California's corporation law specifically. In addition, the Bank's indemnification of Garner was never disclosed in any board or committee minutes, and was unsafe and unsound.

G. OTHER MATTERS

1. The OCC Has Reviewed the Bank's Responses To The September, 1992 ROE

The Bank was asked in the September, 1992 ROE, which was received by the Bank in February, 1993, to respond to the OCC's concerns set forth in this Decision. Much of the information requested in the September, 1992 ROE had been repeatedly requested by examiners in the past, but not provided by the Bank. In reaching the determination to appoint a receiver for the Bank, the Bank's responses, appended hereto as Exhibits 240 through 245 and 248, were carefully reviewed and considered.[48] The Bank's responses, however, offer nothing to change the decision to place the Bank into receivership.

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[48] The Comptroller is afforded the presumption of correctness; to overcome this presumption, the Bank would be required to show that the agency's decision lacked any basis in fact or law or was arbitrary, capricious, or an abuse of discretion. *See Franklin Sav. v. Director. OTS*, 934 F.2d 1127, 1135-36 (10th Cir. 1991). The record reflects that the evidence supporting placing the Bank into receivership is ample, has been considered fairly, and that the Bank has been given ample opportunity to respond to the charges as set forth in the

The September, 1992 ROE was delivered to the Bank on February 25, 1993, and stated that the Bank's response to the report was due to the Washington D.C. office no later than March 22, 1993. On March 15, 1993 the OCC received a letter from the Chairman that stated the Board would submit its response after its regularly scheduled April 20, 1993 meeting. Ex. 246. The OCC responded the same day that the OCC expected board and management had been working in the three months since the exit review to address the issues noted in the exam and highlighted at the December 17, 1992 meeting. Ex. 247.

On March 17, 1993 the OCC responded to another letter from the Bank and reiterated the March 22, 1993 response date. By letter dated March 18, 1993, the Bank indicated again that it planned to submit its response no later than April 22, 1993.

The OCC received seven responses in total to the Report. The first six were partial responses. The six partial responses were dated from March 23, 1993 through April 12, 1993. Exhibits 240 - 245. The seventh and final response included comments not previously submitted, reiterated much from the six partial responses, and dated April 20, 1993 was received via overnight delivery on April 27, 1993. Ex. 248. The seventh response is the Bank's complete response.

Decision Document. Consequently, the law dictates a "narrow and limited scope of review that gives deference to the [Comptroller's] judgment, knowledge, and expertise." *Id.* at 1137.

Even though the Bank's complete response was submitted to the OCC more than a month after it was due, the response did not address most of the concerns raised in the Report or provide any of the requested information.[49] The seven responses, although voluminous, contain very little responsive information. Instead, there are discussions that have no bearing on the serious management and operational problems at the Bank that were identified in the Report[50], unsubstantiated complaints about the conduct of OCC personnel who examined the Bank, including *ad homiminem* attacks that have no basis in fact, and other serious misrepresentations regarding the actions and words of OCC personnel. Because of the vast volume of the Board's comments, and the irrelevance and/or speciousness of most of them, I do not address each and every comment in this Decision Document.

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[49] Instead of providing the requested Bank documents and information, the responses falsely state that the OCC absconded with certain files and documents. The OCC did not remove any original documents from the Bank.

[50] Included in the seventh response is a detailed discussion of the economic conditions in California. However, while economic conditions always have an impact on borrowers and hence, bank performance, economic conditions are not an excuse for illegal and unsafe and unsound practices. Simply operating in a depressed economy does not imply that a bank's deterioration or failure is largely the result of the economic conditions. The vast majority of failed or failing banks have significant internal problems. *See Bank Failure, An Evaluation of the Factors Contributing to the Failure of National Banks* (OCC, June 1988), at 10. In fact, economic conditions are rarely the primary factor in determining a bank's condition. *Id.*

The Bank's first partial response dated March 23, 1993, mainly discussed the Formal Agreement. Ex. 240. This response was fully incorporated in the Response received April 27, 1993, Ex. 248 at 32-41. Generally, the Bank states that it is in compliance and that the Formal Agreement is vague. The Response details the *proposed steps* to be taken and the new *procedures planned* to ensure safety and soundness of the Bank. The Responses do not provide a basis for concluding the Bank has or is likely to achieve compliance with the Formal Agreement.

The Bank's second partial response dated March 25, 1993, mainly discussed Loan Administration, including personnel, problem loan identification, use of external reviews, training credit officers on appraisal techniques, credit approval memorandum, problem credit action plans, information provided to the Board, and credit administration. Ex. 241. This response was incorporated into the response received by the Bank on April 27, 1993. Ex. 248, 46-54.

In its responses the Bank noted that it obtained external reviews of its loan portfolios. However, the responses fail to indicate that the Bank chose, without documenting its reasons, to ignore loan classifications recommended by external review. The Bank reported that new procedures for problem credit identification would be implemented as of March 31, 1993 and that it is strengthening the credit approval process through the provision of training and changing the credit approval memorandum. The procedures for identifying problem credits have not been tested. Moreover, it is not clear that the procedures, even if properly implemented, would be followed. The Bank has not addressed the concerns raised by practices such as improperly upgrading loans that had been classified by the OCC. *See supra* at 25-26.

The Bank's response to the criticism that it uses stale information in evaluating problem loans is that it will indicate expected sources of repayment as "unknown". Ex. 248, 51. This response demonstrates the Bank's inability or unwillingness to address its underlying problems. Instead of planning to accept "unknown" as an expected source of repayment of a problem loan, the Bank should recognize the need to establish procedures to actively identify the current source of repayment. If no identified source of repayment is available, then the source should be identified as "none" and the loan classification adjusted accordingly.

The Bank's third partial response dated March 31, 1993 (Ex. 242), was incorporated into, and supplemented by the seventh response. Ex. 248, 11-15, 21-23, 30-33, and 54-63. These responses discuss among other issues, ALLL, capital, financial condition, and OREO. The Bank stated that it has revised its ALLL methodology to comport with the requirements of BC-201. The Bank even included an exhibit to demonstrate its efforts. The exhibit (Bank's Ex. 29) is significant because it shows the Bank does not provide a reserve for the loans to Director Joan Garner, Nu-Med or College of Osteopathic Medicine of the Pacific. The last two loan were explicitly identified in the September, 1992 ROE as requiring increased reserves. Ex. 2-A, 20. Thus, by its own response, the Bank demonstrated its inability or unwillingness to establish an adequate ALLL as required by law and safe and sound banking practices.

The Bank's response to the OCC's concerns about the Bank's capital level centered on a fact known and recognized by the OCC. There is no doubt that the Bank's capital levels, as they can be determined, meet regulatory minimums. The responses, however, do not address the OCC's conclusion that the excessive levels of operating and management risk in the Bank results in the need for additional capital.

The Bank's discussion of its overall financial condition failed to take into account that its profit and performance ratios do not reflect the Bank's poor quality assets, adjustments to ALLL, and other factors noted above. Ex. 248, 12-14. Although the Bank reported a profit last year, this report did not reflect the prudent adjustments to ALLL that should have been made. The Bank's deteriorating condition is reflected in the steady decline in it return on assets since 1989. The Bank's self-reported leverage ratios are distorted by the failure to recognize problem assets.

With respect to real estate transactions, the Bank has sold a number of OREO properties. *Id.* at 13. Nonetheless, reports to the Board and to the OCC fail to specify adequate information about these transactions. For example, no information is provided on the price, any profit/loss, or amount realized relative to appraised value or the dollar amount of the loan. The Bank suggested that any violation of law resulting from misreporting of covered transactions is de minimis because only a deposit of $800 is needed in order to remove one of the three loans from the category of covered transactions and the rest of the loans were made to "good borrowers." *Id.*, at 60. The response indicated that the Bank does not understand the risks of this type of lending, the law, or prudential banking. *See supra* at 23.

The Bank's response also offered several comparisons of its self-assessed condition and external reports of its conditions. These comparisons include: a newspaper report about profitability of small California banks in 1992 (Ex. 248, 12), a 1992 rating by Findley Reports (*Id.* at 14), a three-year old study based on 52 ratios (*Id.* at 22), external consultant Hogan (*Id.* at 22). The first three studies relied on Bank-reported data and the scope and information provided in the study are unclear. The Bank's response incorrectly stated that all external consultant reports that have evaluated loans have been turned over to the OCC. *Id.* at 23. *See supra* at 73.

The Bank's fifth partial response[51] dated April 8, 1993, Ex. 244, mainly discussed specific classified loans and disagreements between the Bank and the OCC. This response was incorporated into the Response received on April 27th, at pages 63-79. The response failed to provide information sought on certain loans and inadequately addressed the weaknesses noted in the September, 1992 ROE at pages 38-62.

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[51] The fourth response dated April 7, 1993 was captioned "Community Reinvestment Rating – Appeal." For reasons described in the September, 1992 ROE, the OCC rated the Bank "Needs to Improve." Because the Bank's failure to meet the credit needs of its community is not a ground for placing the Bank into receivership, it is not addressed here. *But see, infra* at 17.

Merely stating disagreement with OCC classifications is not an acceptable response to the concerns and criticisms in the Report. The responses did not address or refute the underlying facts that led to the classification of the loans.

For example, while the Bank stated that Associated Partners is making scheduled payments on its loan, a fact not disputed by the OCC, the Bank did not address the 35 year term of the loan. A term that is considered unreasonable. *Compare* Ex. 248, 64-67 with Ex. 2-A, 40 (September, 1992 ROE). Nor did the Bank response address the fact that a major tenant, Nu-Med, has substantial financial difficulties.

The Bank maintains that loans to Joan Garner are current and should not be graded substandard. Ex. 248, 73-75. While the responses indicated that the loans are current, they did not address the underlying weaknesses. The Bank stated that Joan Garner intends to sell one of two houses to pay off loans; it stated that houses in her neighborhood are rarely sold," and drew the conclusion that therefore they are "in demand." Ex. 248, 73-74. Such information is not responsive and does not address concerns that the combination of liens on one house and market conditions would make it difficult to achieve a quick sale to repay loans. While they stated that Joan Garner has $300,000 in cash on hand, the responses did not indicate that this cash is in the form of illiquid IRAs and pension funds. Moreover, the responses did not address examiner concerns, insider on tax returns, that Joan Garner has a negative cash flow.[52]

The Bank's sixth partial response dated April 12, 1993 mainly discussed Bank management, systems and controls, insider loan documentation, salary and key person insurance. Ex. 245. This response was incorporated into the Bank's response received on April 27, 1993. Ex. 248, 41-44. Instead of accepting the fact that Bank management needs improvement, the Bank's responses falsely stated that the OCC required the Bank to have President Hales resign. Ex. 248, 43. At no time did the OCC state that Bank President Hales should resign. The OCC did state that competent leadership was needed and that the President was not given the necessary authority and responsibility to function in his capacity. The responses did not indicate that anyone who would assume the role of President would be given the necessary authority to oversee the operation of the Bank in a safe and sound manner.

The Bank has been told that it needs to hire someone with good credit administration abilities. Ex. 2-A, 15. The Bank Response was to hire two individuals, one in October, 1992 and one in February, 1993. Ex. 248, 46-47. The September, 1992 ROE acknowledged that the person hired in October had appraisal experience. However, the Bank in its responses did not indicate how it will effectively use the knowledge and experience of the two individuals; and how they will address the wealth of credit administration weaknesses in the Bank.

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[52] The response included an attachment, captioned in memorandum style from Garner to NBE Ekstrom and dated December 10, 1992 that purports to addresses OCC concerns about the Joan Garner loans. Neither NBE Ekstrom, any member of his examination team, nor any other OCC employees had seen the memorandum before it was submitted as an attachment to the Bank's response.

The OCC raised concerns about several insider transactions. *See* Ex. 2-A at 12-13. The Bank's response focused on Coast (discussed *supra* at 12.) The Bank stated that Coast paid overdraft charges in the fourth quarter of 1992. Ex. 248, 44. However, the Bank's response ignored the charges the Bank waived for Coast between April and July, 1992. *See infra* at 13.

Contrary to the Bank's assertions, the OCC has continuously requested information on management compensation. *Compare* Ex. 248, 44-45 *with* Ex. 2-A, 13. At no point was such documentation provided. *See supra* at 67-70. The Bank's response stated that the Compensation Committee reviewed Garner's compensation and an exhibit containing what purports to be Compensation Committee Reports are attached to the response. Ex. 248, 45. The Bank's response did not address the amount of Garner's compensation, nor did it address that fact that even by its own exhibits, that Garner's compensation is excessive. Moreover, the Response does not include any analysis by the Compensation Committee. The qualifications of the chair of that committee, while impressive, have no apparent relationship to the ability to determine an acceptable and appropriate compensation level of a Chief Executive Officer of a bank. Indeed, the exhibit suggests that Garner's compensation has been even higher than the OCC previously thought.[53]

The Bank also disputed OCC criticism of key-person insurance. Ex. 248, 45-46; *supra* at 17. The Bank's response did not explain the detrimental effect on the Bank of the insureds' death. Nor did the Bank explain why there is an insurable interest in directors and executive officers with a tenure of five years or more, but not in the Bank's President. The Bank fails to understand that insurance is an illegal investment unless certain criteria, which are noted in BC 249, are met.

Not only did the Bank's responses fail to address the issues raised in the September, 1992 ROE, they also contained blatantly false statements and half-truths. For example, the Bank's characterization of the on-site examination in July and August, 1992 was grossly inaccurate and plainly false. The Bank asserted that examiners entered the Bank in a manner similar to a "raid," or "siege," or "takeover," and that "(g)uns were evident. Ex. 248, 7. These allegations are untrue. The Bank also asserted that during the on-site examination, OCC personnel removed pictures of Garner's family from frames in Garner's private office and removed personal items from Garner's private desk. *Id.* at 24. These allegations are unfounded, unsubstantiated, and false. Although the Bank inundated the OCC during the on-site examination with correspondence detailing the Bank's protests over the examination and alleged improper acts by OCC personnel, this is the first time the Bank has charged that items were taken from Garner's office.

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[53] The OCC examination report stated that Garner's salary was $201,000 in 1991 and $300,000 in 1992 and that his 1991 bonus of $100,000 was paid in 1992. The Bank's response indicated that Garner's salary was $300,000 in 1991 and that he was not paid a bonus in 1991. The Bank's response stated that Garner was paid $300, 000 in 1992 and was paid a bonus of $100, 000 in 1992. Moreover, a undated compensation report prepared Deloitte Haskins & indicates that Garner's compensation exceeded even the high end of total compensation in the region highlighted by the Bank. Ex. 263.

The Bank also alleged that during the on-site examination, "someone" directed that Garner's tax returns be removed from his files in the Bank. *Id.* This allegation is self-serving, unfounded and false. In addition, the Bank asserted that OCC records indicate that the returns had been in Garner's files at least until June, 1992. *Id.* This statement is also false, and an example of the Bank's misstatements throughout its responses. Although portions of Garner's tax returns have been located in his files, complete copies were never made available for examiner review. The Bank correctly stated in its response that Garner's tax returns were missing from the Bank, and that the OCC subpoenaed copies of them from the Bank. *Id.* The Bank's response also correctly stated that Garner "agreed to comply" with the subpoena. However, the Bank's attempt to make it appear that Garner was cooperative was yet another misstatement and half-truth. The Bank's response failed to state that although Garner "agreed to comply" with the subpoena eight months ago in September, 1992, he has still refused to produce copies of several returns (specifically, those years indicating his ownership in KHO, discussed *supra* at 61). Moreover, Garner's general depiction of the July, 1992 on-site examination of the Bank was unresponsive to the OCC's request for information.

With regard to the Bank's payment of Garner's personal legal fees relating to his disbarment proceeding in New York, the Bank re-stated its improper contention that the OCC violated its own rules by forwarding a "doctored" version of Garner's Confidential Biographical and Financial Report to the New York State Bar. *Id.* at 15. *See supra* at 96. This assertion, made for the first time, is unfounded and false. The Bank also stated that the OCC and New York State Bar Association conspired to falsely accuse Garner of "seeking a bar application." What the Bank means by this exactly, is unclear, but to suggest that an agency of the United States and the New York State Bar Association would conspire in any way against Garner is ridiculous. As discussed *supra* at 96, Garner was disbarred for falsifying government documentation.

The Bank stated that the September, 1992 ROE raised issues that took place "years ago" and provided further evidence of the Western District office's "personal vendetta and obsession" with the Bank. *Id.* at 14. Although a number of the issues raised in the September, 1992 ROE did in fact occur in the mid to late 1980s, much of the self-serving insider abuses detailed in this Decision was concealed from examiners, and came to light only as a result of the 1992 Investigation. For example, although examiners were aware that Bank was involved in a large number of lawsuits, and had previously requested information relating the Bank's involvement in those lawsuits, it was only as a result of the 1992 Investigation that the full extent of the Bank's involvement in a number of those suits (ie: Dr. Daniel lawsuit discussed *supra* at 77) was revealed. Although the Bank stated in its response that it had complied with examiner requests in the past, this is not the case. Duchscherer Decl. ¶ 25.

To state that the ROE reflects the Western District office's view toward the Bank is erroneous and unsupported, since the report was generated in the Washington Office, and that supervision of the Bank was transferred to the Washington Office in January of this year.

Finally, one last example of the Bank's misstatements is found on page 20 of the Bank's response received by the OCC on April 27, 1993. Ex. 248. In response to the OCC's statement that Garner removed documentation from his brother Daniel's credit file, the Bank responded that the statement was false.[54] However, this assertion by the Bank ignores the fact that Garner personally provided examiners in March, 1989 with a memorandum in which he admitted to removing documentation from Daniel's file. Ex. 136. *Supra* at 48. Garner admitted at that time to have removed the documentation in order to conceal it from examiners. *Id.*

2. Receivership Is The Proper Action To Take In This Instance

In reaching the determination to appoint a receiver for the Bank, all other remedies available to the OCC that could be employed in the present situation were examined. Among the actions reviewed were conservatorship, cease and desist order, temporary cease and desist order, suspensions, and removal and prohibition actions.

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[54] The OCC inadvertently referred to Daniel as a "director" in a sentence in the September, 1992 ROE, when in fact Daniel is not a director. Daniel, however, is an executive officer of the Bank.

As stated *supra* at 8, the OCC has instituted prohibition actions against the entire board and all but one of the Bank's senior management team. Pursuant to 12 U.S.C. § 1818(e)(1), the OCC may remove an individual from his or her position in a national bank and prohibit that individual from participating in the affairs of any insured depository institution if that individual meets the standards set forth in the statute. The removal and prohibition become effective only after an administrative hearing is held and the Comptroller determines, based on the record of the hearing, that the action is justified. However, removals alone are not sufficient to address the enormous quandary that the Bank has placed itself in. Although section 1818(e)(1) was designed to extract individuals from a bank and prohibit them from ever again participating in the affairs of any insured financial institution, the statute is not designed to address the present situation, namely the Bank's rapidly deteriorating condition, and its inability or unwillingness to operate on a safe and sound basis and in compliance with applicable laws and regulations. Nor does section 1818(e)(1) address the situation, such as is evident here, where insiders dominate a bank to a degree where they will more than likely continue to violate the law and operate the bank in an unsafe and unsound manner, putting the Bank at further risk. In such cases, the OCC has the authority to *immediately* remove an individual from his or her position at a national bank, pending the outcome of an administrative hearing, pursuant to 12 U.S.C. § 1818(e)(3). Such an action is called a "suspension," and is effective upon service. However, as with removal and prohibition actions, suspensions are not designed to address the immediate situation facing the Bank, namely its extremely unsatisfactory and rapidly deteriorating condition. Although a number of insiders warrant suspensions, it is clear that those individuals might exert control over the other insiders left to run the institution and who face removal and prohibition hearings themselves in the near future. Again, this situation leaves the Bank at risk, and fails to address the immediate concerns facing the Bank.

Another enforcement action considered was a temporary cease and desist order. Pursuant to 12 U.S.C. § 1818(c), the OCC may issue a temporary cease and desist order against a national bank, requiring the bank to cease and desist from engaging in any violation or practice or requiring it to take affirmative action to prevent (1) significant dissipation of the bank's assets or earnings, or (2) the likely insolvency of the bank, or (3) the likely weakening of the bank's condition. The temporary order is effective upon service. The OCC determined that a temporary cease and desist order in the present instance would be insufficient. Finke Decl. ¶ 30. Temporary cease and desist orders are not designed to address the present instance wherein the Bank's board and senior management are unwilling to cooperate with examiners and its supervisory agency. The Bank ignores examiners' findings and continues to do so to this day. The Bank has specifically chosen not to abide by an outstanding Formal Agreement it entered into with the OCC in March, 1989.

It is unreasonable to believe that the Bank would comply with the terms of a temporary cease and desist order. In addition, a temporary cease and desist order fails to remove the main source of the Bank's problems, its current management, from exercising control over the Bank.

The OCC applied the same reasoning when considering whether to issue a cease and desist order on the Bank, pursuant to 12 U.S.C. § 1818(b). In addition to this order clearly being insufficient, as in the case of a temporary cease and desist order, an 1818(b) order is not effective until either the Bank agrees to its terms, or until an administrative hearing is held and the Comptroller makes a final determination. This particular action would also leave management in the Bank, and would not address the immediate condition, as discussed above.

The only remaining alternative to the appointment of a receiver would be the appointment of a conservator for the Bank, pursuant to 12 U.S.C. § 203. However, conservatorship would not be an adequate remedy for the severe problems existing at the Bank. The Bank's pervasive concealment and falsification of Bank records would make it virtually impossible for even the most capable conservator to ascertain the full extent of the Bank's unsafe and unsound condition, or its unsafe, unsound and abusive practices. It is more than likely that a conservator would replace all of present management, and would not be able to get a full team of new management into the Bank in time to save it. Consequently, a conservator would be prevented from achieving the purpose behind the conservatorship statute, that being to conserve a bank's assets. Moreover, even if circumstances were such that it *would* be possible for a conservator to perform his or her job effectively at the Bank, there would be no public benefit to keeping the Bank open and placing it into conservatorship instead of closing it and placing it into receivership. The Bank is but one of 14 commercial banks with 30 offices in the city of Anaheim. Most of the Bank's deposits and loans are outside of the city of Anaheim and, as a result, the Bank does not serve its own community. Therefore, the Bank's community, which has adequate banking service available to it, will not be harmed or greatly inconvenienced by the closing of the Bank.

3. 12 U.S.C. § 1821(c)(5) Applies To Actions By The Bank Prior To And Subsequent To December 19, 1992

As part of the decision to appoint a receiver for the Bank, the Comptroller considered whether the receivership authority granted by 12 U.S.C. § 191, as amended, applies retrospectively, and determined that it does.

At the outset, it is worth noting that the pre-FDICIA acts engaged in by the Garners and the board are of a continuing nature and have continued into the present. They demonstrate a pattern of unsafe or unsound practices and regulatory violations which have continued since the enactment and effective date of FDICIA. Consequently, the actions of the Garners and the board are subject to 12 U.S.C. § 191, as amended by FDICIA.

Even in the absence of a continuing pattern of unsafe or unsound practices and regulatory violations, there is no retrospective application of receivership statndards [sic] which became effective on December 19th of last year. Although statutes are generally applied prospectively, statutory changes that are remedial or procedural in nature are presumed to be retrospective in their application. Remedial or procedural changes do not effect substantive rights, but rather are concerned with changes in procedures or remedies. The FDICIA amendments to the receivership authority as stated in 12 U.S.C. § 191, as amended, are remedial and procedural in nature, and thus, should be applied retrospectively.

The Comptroller's receivership authority was amended, most recently, in 1991, to enumerate specific instances whereby the Comptroller could place a national bank into receivership. *See* FDICIA, Pub. L. 102-242, Title I § 133(b), (g), 105 Stat. 2271, 2273 (1991). These instances include, *inter alia*, concealment of the bank's books and records, violations of law, rule or regulation, unsafe or unsound practices, and the willful and continuing violation of an enforceable order.

Prior to FDICIA, the primary basis for placing a bank into receivership was insolvency. *See* 12 U.S.C. § 191, as amended (prior to December 19, 1991). However, alternative statutory provisions allowed the Comptroller to place banks into receivership for violations of law, rules and regulations, and for unsafe and unsound practices. *See* 12 U.S.C. § 1818(a) (termination of insured bank status), 12 U.S.C. § 93 (franchise forfeiture based on violations of law), and 12 U.S.C. § 481 (franchise forfeiture based on refusal to disclose information on bank affiliates). Although these methods granted the OCC broad discretion to use the receivership authority as a remedy against violations of law and unsafe or unsound practices, these methods were particularly cumbersome. In order to use the receivership action under §§ 1818(a), 93 or 481, the Comptroller was required to take other actions as well. For instance, through the use of a "termination of a bank's insured status" action brought by the Federal Deposit Insurance Corporation[55] in combination with a receivership action brought by the Comptroller, the Comptroller could address: (1) unsafe or unsound practices; (2) unsafe or unsound conditions to continue operations as an insured institution; or (3) a bank or bank directors' violations of any applicable law, rule, regulation or order, or any conditions imposed in writing, or any written agreement with the OCC or FDIC. In addition, by using a "franchise forfeiture" action pursuant to 12 U.S.C. § 93 in combination with a receivership action, the Comptroller had the authority to address knowing violations of any law, rule or regulation. Finally, through the use of a "franchise forfeiture" action pursuant to 12 U.S.C. § 481 in combination with a receivership action, the Comptroller had the authority to address refusal to provide information.

It is clear that the pre-FDICIA provisions enabled the Comptroller to effectuate receivership, in one form or another, under the same conditions as outlined in the FDICIA amendments to 12 U.S.C. § 191. Thus, 12 U.S.C. § 191, as amended, should be interpreted as Congress' specific codification of the Comptroller's general statutory authority at 12 U.S.C. §§ 191, 1818(a), 93, and 481. It follows, therefore, that the changes to § 191 are remedial in nature since the Amended provisions merely revise the procedures necessary to place a bank into receivership. Consequently, 12 U.S.C. § 191 should be applied retrospectively.

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[55] One of five directors on the FDIC's Board of Directors shall be the Comptroller of the Currency. 12 U.S.C. § 1812(a)(1)(A).

H. CONCLUSION

The activities and conditions set forth in this document clearly support a decision to place the Bank in receivership. The Bank is in an unsafe and unsound condition to transact business. The volume of problem assets greatly exceed the Bank's capital funds and the Bank is operating with longstanding, seriously deficient lending practices, a weak, abusive, and self-serving management and directorate, and an inordinate reliance on volatile, high cost deposits to fund its operations.

The Bank has concealed, and continues to conceal Bank information needed by examiners to properly assess its condition and its compliance with statutes and regulations. The Bank has concealed Daniel's status as an executive officer. The Bank has concealed the record of Daniel's bankruptcy. Daniel's true financial condition was concealed from examiners by Garner as he removed Bank records from Daniel's credit file. Tax returns for a related interest of Garner's, KHO, were submitted to the Bank in connection with Bank loans and are considered Bank records. Portions of the returns, however, which would have revealed Garner's interest in the company, were not there and Garner refused to honestly respond to examiner's questions as to the ownership of KHO. The missing portions of the tax returns are Bank records, and Garner's removal from the files or failure to put the complete document into the file is concealment of Bank records. Furthermore, Garner executed, in his official Bank capacity, hold harmless agreements with named obligers on KHO loans. These agreements, which are clearly Bank records, were not in the borrower credit file nor recorded in loan approval records. Thus, Garner again concealed Bank records. Finally, the board minutes contained no record of the Dr. Daniel litigation or the decision by the board to settle. These were material events significantly affecting the Bank; for the board minutes to conceal these matters is unsafe and unsound. The Bank required, as a condition of the settlement, that it be notified by the counterparts in the event a regulatory agency attempted to obtain the settlement. This is an obvious attempt on the part of the Bank to inhibit disclosure of these matters to the OCC. The lawsuit filed by the Bank and subsequent settlement are Bank records which were concealed from examiner review. The Bank continues to refuse to provide the Agency with credit files for two insider-related companies, Medi-Fin and the Dal Rae Restaurant. It continues to refuse to provide the OCC with a Management study performed by a consulting firm in 1990. The Bank continues to withhold ownership information on two insider-related borrowers, Mediquip and Associated, one of which examiners only learned of insider conflicts from outside parties.

The Bank also engaged in a multitude of illegal and unsafe and unsound activities with respect to MFD. The use of Bank funds to pay Garner's legal fees in defense of his disbarment proceedings was unsafe and unsound and patently unjustified. The decision of the board to involve the Bank in Garner's personal legal problems with Dr.

Daniel was unsafe and unsound. As a result of these illegal and unsafe and unsound practices, the Bank suffered substantial dissipation of its assets and earnings with the identified costs to the Bank of approximately $1,400,000.

Finally, the Bank continues to engage in unsafe and unsound practices and violate laws and regulations which are likely to weaken the Bank's condition and seriously prejudice the interest of depositors. The Bank continues to administer insider loans in a preferential manner with the most recent examination identifying approximately $32,000 in lost earnings resulting from this unsafe and unsound activity. Loans to director Joan Garner and an insider-related loan (Nu-Med) are classified and have been handled in an unsound manner. A significant number of loans have insufficient credit information, and a broad range of other poor lending practices were again identified during the most recent examination of the Bank. The Bank is unable to identify its problem loans and the staff of lending officers is untrained and dominated by Garner and Daniel. Other significant unsafe and unsound activities and conditions include a self-serving senior management, payment of excessive, and unsupported compensation to Garner and the absence of independent controls over the payment of fees to Garner's brother, Harvey Garner. All of these practices and conditions are unsafe and unsound, are likely to further weaken the Bank's condition, and are likely to cause substantial dissipation of the Bank's assets and earnings.

Given the extensive and well-documented instances of concealment of Bank records, the numerous misleading and inaccurate statements made by Bank officers to examiners, and the number of hidden insider relationships with Bank borrowers, an accurate assessment of the Bank's condition cannot be determined through a normal examination process. This is decisively illustrated by the events related to the Dr. Daniel matter. Board of director minutes are meant to record the official actions of the board and examiners rely heavily on these presentations in assessing the Bank's current activities and its future prospects. It was clearly improper for the directors not to record in the minutes their deliberations and decisions regarding the Dr. Daniel lawsuit and settlement.

The Bank's condition is more than likely much worse than the extremely serious condition disclosed by the current examination. To place the Bank in conservatorship would only prolong what is seen as an inevitable government resolution. But even if this were not the case, the history of self serving practices, and extensive and serious conflicts of interests which exist, almost assures a continuation of significant legal actions being initiated against the Bank. The potential liability associated with this activity would seriously restrict the eventual sale of the Bank.

As such, it has been determined that:

(i) The Bank's assets and earnings have been substantially dissipated due to violations of statutes and regulations, and due to unsafe and unsound practices;

(ii) The Bank, its directors, officers, and agents, have concealed the Bank's books, papers, records, or assets, and have refused to submit the Bank's books, papers, records, or affairs for the inspection of examiners;

(iii) There are violations of law and regulations, and unsafe or unsound practices or conditions, that are likely to cause a substantial dissipation of assets or earnings, weaken the Bank's condition, and otherwise seriously prejudice the interests of the Bank's depositors or the deposit insurance fund; and

(iv) The Bank is in an unsafe or unsound condition to transact business.

Accordingly, it is appropriate to appoint the FDIC as receiver to take possession and control of American Commerce National Bank, Anaheim, California.

WITNESS MY HAND, this 30th day of April, 1993.

/s/ Stephen R. Steinbrink
Stephen R. Steinbrink
Senior Deputy Comptroller
for Bank Supervision
Operations

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AMERICAN COMMERCE NATIONAL BANK,

Plaintiff-Appellant,

and

GERALD L. GARNER; JOAN G. GARNER; ROBYN ZIMMET, individually as trustee and on behalf of herself and all others similarly situated; WILLIAM KAVANAGH; JANET M. KAVANAGH; ROBERT YOUNG,

Plaintiffs,

v.

OFFICE OF THE COMPTROLLER OF THE CURRENCY; FDIC,

Defendants-Appellees.

ORDER

(Filed April 28, 1999)

GERALD J. GARNER; JOAN G. GARNER; ROBYN ZIMMET, individually as trustee and on behalf of herself and all others similarly situated; WILLIAM. KAVANAGH; JANET M. KAVANAGH; ROBERT YOUNG; HARVEY GARNER, individually as trustee and on behalf of himself and all others similarly situated: GALAL S. GOUGH; DUFFERN H. HELSING; ROBERTA HELSING;

THOMAS J. HEINZ; ROBERT ALAN JOSEPH; SHEILA JOSEPH; HAIM ASA; ELAINE ASA,

Plaintiffs-Appellants,

and

AMERICAN COMMERCE NATIONAL BANK,

Plaintiff,

v.

OFFICE OF THE COMPTROLLER OF THE CURRENCY; RICHARD BLAKE; GERALD FUJITA; RUFUS O. BURNS; FEDERAL DEPOSIT INSURANCE CORPORATION,

Defendants-Appellees.

No. 97-56412

DC No. CV
93-6674 GHK

Before: BEEZER, TASHIMA, and SILVERMAN, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges Tashima and Silverman vote to deny the petition for rehearing en banc and Judge Beezer so recommends.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are denied.

STATUTORY PROVISIONS INVOLVED

1. Administrative Procedures Act, 5 U.S.C. § 706(2):

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings and conclusions found to be –

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

2. Federal Deposit Insurance Corporation Improvement Act of 1991, ("FDICIA"), sec. 133(a), (b), Pub. L. No. 102-242, 105 Stat. 2236, 2270-71 (codified as amended at 12 U.S.C.A. § 191 (West Supp. 1999)):

The Comptroller of the Currency may, without prior notice or hearings, appoint a receiver for any national bank (and such receiver shall be the Federal Deposit Insurance Corporation if the national bank is an insured bank (as defined in section 1813(h) of this title)) if the Comptroller determines, in the Comptroller's discretion, that –

(1) one or more of the grounds specified in section 1821(c)(5) of this title exist; or

(2) the association's board of directors consists of fewer than 5 members.

3. Federal Deposit in Insurance Corporation Improvement Act of 1991, sec. 133(a), (b), Pub. L. No. 102-242, 105 Stat. 2236, 2270-71 (codified as amended at 12 U.S.C.A. § 1821(c)(5)(E) & (H) (West Supp. 1999)):

(E) Concealment

> Any concealment of the institution's books, papers, records, or assets, or any refusal to submit the institution's books, papers, records, or affairs for inspection to any examiner or to any lawful agent of the appropriate Federal banking agency or State bank or savings association supervisor.

(H) Violations of law

Any violation of any law or regulation, or unsafe or unsound practice or condition that is likely to –

(i) cause insolvency or substantial dissipation of assets or earnings;

(ii) weaken the institution's condition; or

(iii) otherwise seriously prejudice the interests of the institution's depositors or the deposit insurance fund.

4. Federal Rule of Civil Procedure 56(c) (West 1999):

Motion and Proceedings Thereon . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answer to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgement as a matter of law.

In The
UNITED STATES COURT OF APPEALS
For The Ninth Circuit

◆

Nos. 97-56409 and 97-56412

◆

AMERICAN COMMERCE NATIONAL BANK, GERALD J. GARNER, JOAN G. GARNER, ROBYN ZIMMET, individually as trustee and on behalf of herself and all others similarly situated, WILLIAM and JANET M. KAVANAGH, ROBERT YOUNG, HARVEY GARNER, individually as trustee and on behalf of himself and all others similarly situated, GALAL S. GOUGH, DUFFERN and ROBERTA HELSING, THOMAS J. HEINZ, ROBERT and SHEILA JOSEPH, HAIM and ELAINE ASA,

Plaintiffs-Appellants,

–vs–

OFFICE OF THE COMPTROLLER OF THE CURRENCY, RICHARD BLAKE, GERALD FUJITA, RUFUS O. BURNS,

Defendants-Appellees,

FEDERAL DEPOSIT INSURANCE CORPORATION,

Defendant.

◆

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
DISTRICT COURT CASE NUMBER CV 93-6674-GHK
THE HONORABLE GEORGE H. KING

◆

APPELLANT'S OPENING BRIEF

(Filed Feb. 10, 1998)

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* * *

A. NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION BELOW

ACNB, members of the Bank's Board of Directors, shareholders of the Bank and other affected parties filed these consolidated actions against the Comptroller, various individual defendants, and the Federal Deposit Insurance Corporation ("FDIC"). The Second Amended Complaint was filed in the Central District of California on November 17, 1995, and alleged violations of due process under the Administrative Procedures Act, violations of the Constitution pursuant to *Bivens v. Six Unnamed Federal Agents*, 408 U.S. 388 (1971), sought a declaratory judgment that the closure was void and reasserted various receivership claims against the FDIC.[2] (E.R. 00721.) On July 11, 1997, the District Court issued a final order disposing of all claims against the Comptroller and the individual defendants based upon the following:

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[2] Issues relating to the claims against the FDIC are not part of this appeal.

Summary Adjudication of *Bivens* Claims: On May 10, 1996, the District Court granted summary judgment to the Comptroller and the individual defendants on the *Bivens* claims because it found "the defendants' anti-Semitic conduct was [not] a 'substantial' or 'motivating' factor in the Bank's closure." (E.R. 02803-02809.) (May Dist. Ct. Decision at 6-12.) In its decision, the District Court concluded that it could find no causal connection between the Comptroller's misconduct and the closure of the Bank despite the comptroller's reliance, at the time of the closure, on documents created by those employees of the Comptroller engaging in the improper conduct and created at the time of their improper conduct.

Summary Adjudication of APA Claims: The July 18, 1996 Order summarily adjudicated the APA and declaratory judgment claims. (E.R. 02826.) (July Dist. Ct. Decision at 1.) Because the statutory authority under which the Comptroller closed the Bank did not take effect until December 19, 1992, and in an effort to avoid the issue of retroactivity, the District Court attempted to base its decision on post-effective-date conduct. (E.R. 02828.) (July Dist. Ct. Decision at 3.) The District Court erroneously examined the Comptroller's Administrative Record, compiled solely by the OCC in the absence of a hearing or other due process, under the substantial-evidence test. (E.R. 02827-02831.) (July Dist. Ct. Decision at 2-6.) Furthermore, the Court explicitly rejected its obligation to review for genuine issues of material fact and improperly decided the ultimate jury question at the summary judgment stage. (E.R. 02827-02831.)

Following this final order disposing of all claims against the Comptroller and the individual defendants, the District Court issued its July 11, 1997 judgment. (E.R. 02832.) Appellants filed timely notices of appeal. (E.R. 02834-02850.)

B. STATEMENT OF THE FACTS

ACNB, located in Anaheim, California, was chartered on February 29, 1984. (E.R. 00595.) (Admin. R. at 10.) Gerald Garner, an attorney with business and political experience, was asked by members of the Bank's Board of Directors to join the Bank. (E.R. 01009.) (April 1, 1996 Garner Decl. ¶ 295.) Mr. Garner was not part of the original organization of the Bank, although he joined the Board of Directors before the Bank was chartered. (E.R. 00872.) (April 1, 1996 Garner Decl. ¶ 2.) He later became the Bank's chairman. (E.R. 00872.) Also on the Board was Joan Garner, Mr. Garner's wife, presently of 35 years. Mr. Garner's brother, Daniel Garner was later invited to join the Bank to handle its marketing efforts. (E.R. 00910-00911.) (April 1, 1996 Garner Decl. ¶¶ 79, 83.K.)

The Bank was a profitable institution, posting a pretax profit of over $1,700,000.00 in 1992. (E.R. 00879.) (April 1, 1996 Garner Decl. ¶ 25.) This success was achieved while successfully weathering a significant downward turn in the Southern California economy. While the "[e]arnings at the Golden State's four hundred thirty-five community banks plunged 74%" in 1992, the ACNB's profits only dropped 13%. (E.R. 00915, 01386.) (Bill Atkinson, *A California Revival? Not for Smaller Banks*, AMERICAN BANKER, April 12, 1993, at 1, 6.) In fact, Findley Reporting Services, Inc., honored ACNB with "The Findley Reports' *SUPER PREMIER PERFORMING BANK* award based on [its] 1991 performance." (E.R. 00920, 01391.) (Letter from Findley Reports to Bank.) ACNB was the only Orange County bank to receive this award.

The Bank used this prosperity to better the Anaheim and Orange County communities in which it operated. The Bank was very active in the Orange County Jewish community, particularly with charitable endeavors and fund-raising activities. (E.R. 00876, 01150.) (April 1, 1996 Garner Decl. ¶ 12 and Exhibit 5.) For example, the Bank and its directors were active in the local temples, supportive of Ben Gurion University, the Anti-Defamation League, Chabad of Irvine, Friends of Hebrew University, the Southern Orange County Jewish School, the Jewish Senior Center of Orange County, Hadassah, and participated in the Orange County Chamber of Commerce, the Board of Medical Quality Assurance, the Boy Scouts of Orange County and various other local interests. (E.R. 00876, 01150.) Since the Bank's inception, the Comptroller closely monitored the Bank, conducting almost yearly examinations of the Bank's condition. (E.R. 00001.) (Admin. R. at 862.) Each of its examinations, with one notable exception, culminated in a Report of Examination, ("ROE"), which encapsulated its findings. (E.R. 00001.) (*See, e.g.,* Admin. R. at 862 (1984 ROE).) It was through these examinations that the Comptroller's conflict with Mr. Garner began.

Mr. Garner's Judaism, along with his imposing physical presence and strong personality, agitated and perturbed employees of the Comptroller. Unfortunately, this conflict was escalated by the Comptroller to unlawful proportions. As is detailed more fully below, OCC examiners and directors referred to Mr. Garner as "the Jew with the Jewish jewelry," "the Big Jew," and opined that the Bank's Board "had a bad ethnic balance," and inquired whether ham sandwiches were served at Board meetings. *See* Section IV.A.3.c.1-5. These comments were made by OCC examiners such as Gerald Fujita and Marie Gallegher, OCC counsel Richard Blake, and District Administrators Rufus Burns and Joseph Vaez and resulted in apologies to the Bank on more than one occasion. (E.R. 00432.) (Admin. R. at 4177.)

The hostility was not limited to mere words. The examiners altered bank files and documents, arbitrarily classified loans, capriciously crunched numbers, made requests for documents which were either non-existent or solely in their possession, falsely accused the Bank and its employees of wrongdoing that could not be substantiated, changed their requests to the Bank on a whim, and embarked on intimidating searches which uncovered nothing. (E.R. 00735-00758, 008873-01009.) (Compl. ¶¶ 29-106; April 1, 1996 Garner Decl. ¶¶ 3-295.)

Although the more egregious acts are discussed more fully below, one exacerbating instance bears mentioning here. In 1988, the Comptroller focused on an Israeli bond purchased by the Bank. (E.R. 00875.) (April 1, 1996 Garner Decl. ¶ 8.) OCC examiner William Nocetti told the Bank that he would "get the Bank" for the Israeli bond by alleging either (a) the Bank was lending money to a foreign government, (b) the Bank was selling bonds without a license or (c) this was an illegal investment. (E.R. 00875.) (April 1, 1996 Garner Decl. ¶ 9.) The meeting in which this was stated ended with one of Nocetti's examiners commenting, "who would want to invest in Israel anyway." (E.R. 00875.) (April 1, 1996 Garner Decl. ¶ 9.)

Following conversations with Mr. Garner's political acquaintances, Israel's Minister of Finance interceded with the United States Treasury Department and the Bank's investment in the Israeli bond was accepted and was not classified. (E.R. 00876.) (April 1, 1996 Garner Decl. ¶ 11.) This incident resulted in an apology from OCC district counsel Joseph Pogar. (E.R. 00876.) (April 1, 1996 Garner Decl. ¶ 11.) The OCC employees' resentment towards Mr. Garner grew from this incident due to the perception that he could "go over their heads" in the case of a disagreement.

In July 1992, the Comptroller conducted a surprise examination under the supervision of OCC attorney Richard Blake. (E.R. 00929, 01434.) (Blake Depo. Transcript (stating "I was the person ultimately responsible for the July '92 exam.").) The examiners appeared during customer hours in a raid-like fashion, accompanied by an FBI agent and two Secret Service agents whose firearms were in plain sight. (E.R. 00929, 01161.) (April 1, 1996 Garner Decl. ¶ 105; Kavanagh Decl. ¶ E.13.) Bank employees were threatened with arrest by Mr. Blake should they interfere with OCC duties. (E.R. 01160-01162.) (Kavanagh Decl. ¶ E.11, 16.) The OCC immediately sealed rooms and files with crime scene tape. (E.R. 00434.) (Admin. R. at 4179.) An intense examination followed, in which the examiners focused almost exclusively on loan files from 1984 to 1988. (E.R. 00930.) (April 1, 1996 Garner Decl. ¶ 109.) At the Bank's expense, nearly 200,000 pages were copied from these files. (E.R. 00430.) (Admin. R. at 4175.) In addition to the copies taken during this exam, numerous loan files were removed from the Bank. (E.R. 00930, 02031.) (April 1, 1996

Garner Decl. ¶ 112 and Exhibit 126 (handwritten list of removed files).) The examiners were obviously not interested in the July 1992 condition of the Bank. No ROE was ever received by the Bank for this examination. (E.R. 00435.) (Admin. R. at 4180.)[3]

The Bank's last examination began in November of 1992, and analyzed the Bank's condition "as of" September 30, 1992. (E.R. 00357.) (Admin. R. at 379.) The Bank received this ROE on February 25, 1993, ("February 1993 ROE"). (E.R. 00426.) (Admin. R. at 4170.) The February 1993 ROE requested thousands of pages of documents which were to be produced by March 22, 1993, a mere 25 days later. (E.R. 00383-00386.) (Admin. R. at 405-08.) This was an extremely brief period of time to retrieve documents dating back nearly a decade. As is explained more fully below, the Comptroller already possessed many of the requested documents or knew that they did not exist pursuant to the OCC-approved document retention policy of the Bank. The February 1993 ROE also contained misstated facts, unsubstantiated accusations and arbitrary conclusions. These problems were raised in the Bank's April 20, 1993 Final Response to the ROE, ("Bank's Final Response"), but were never addressed by the Comptroller. The Comptroller received the Bank's Final Response on April 27, 1993.

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[3] These events also gave rise to civil charges by the OCC against Mr. Garner, Joan Garner and Daniel Garner personally. (E.R. 00910.) (April 1, 1996 Garner Decl. ¶ 80.) An administrative hearing which lasted eight and one-half months was held to determine whether civil penalties should be assessed. (E.R. 00873.) (April 1, 1996 Garner Decl. ¶ 3.) The administrative hearing was never completed. After demanding $1 million in civil money penalties against Mrs. Garner, the Comptroller accepted a payment of only $22,000. (E.R. 00910.) (April 1, 1996 Garner decl. ¶ 80.) After seeking half a million dollars against Daniel Garner, the OCC settled for a mere $15,000. (E.R. 00910.) (April 1, 1996 Garner Decl. ¶ 80.) The other directors were permitted to settle for approximately $1,000.00 each.

The whole experience proved embarrassing as the falsity of OCC charges become obvious. In fact, Frank Goldman, lead enforcement counsel for the OCC in this proceeding, admitted that the Comptroller only retained Mrs. Garner and Daniel Garner in the matter in order to secure a stipulation form Gerald Garner. (E.R. 00910.) (April 1, 1996 Garner Decl. ¶ 80.) As the process wore him down, Mr. Garner finally stipulated to a monetary fine and an agreement not to re-enter the banking profession. (E.R. 00910.)

Suddenly and without warning, the Comptroller closed the Bank on April 30, 1993 – a mere three days after the Response was received. Although insolvency had always been a prerequisite to closure, the Comptroller interpreted new statutory language to authorize the seizure of solvent banks. The Bank never received notice or a hearing before the closure. The justification for the closure is detailed in the OCC's Decision Document. (E.R. 00586-00717.) (Admin. R. 1-132.) These accusations and the factual circumstances surrounding them are discussed more fully below.

In an effort to obtain some substantive review of what objectively appears to be an arbitrary and capricious decision by the Comptroller, the Bank and its related parties filed this action. Unfortunately, the District Court failed to examine the substantive issues, summarily dismissing them through use of an improper standard of review.

* * *